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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 155

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

H. E. MARTIN AND W. H. PORTER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

PETITION FOR CERTIORARI FILED MAY 22, 1930

CERTIORARI GRANTED OCTOBER 13, 1930

(35,070)

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THE CHESAPEAKE AND OHIO RAILWAY COMPANY

v.

H. E. MARTIN and W. H. PORTER

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS AND ORDER ALLOWING SAME

To the Honorable Judges of the Supreme Court of Appeals:

The petition of The Chesapeake and Ohio Railway Company, a corporation, respectfully represents that it is aggrieved by a final judgment of the Law & Equity Court of the City of Richmond, Part II, entered on the 6th day of June, 1927, in favor of the plaintiffs against your petitioner, for the sum of $1,684.39, with interest from the 16th day of November, 1925, upon a demurrer to the evidence in an action at law wherein H. E. Martin and W. H. Porter were plaintiffs and your petitioner was defendant. The parties will be hereinafter referred to as plaintiffs and defendant, respectively. Herewith presented is a transcript of the record.

Statement of the Case

The case involves a claim for damages for an alleged misdelivery of a carload shipment of potatoes belonging to the plaintiffs. While other grounds of defense were relied upon at the trial of the case, in filing a demurrer to the evidence of the plaintiffs, the defendant conceded that there was a misdelivery of the shipment or a delivery made without [fol. 2] authority therefor, and rested its defense solely upon a provision in the bill of lading covering the shipment which required claims for loss, damage or injury to property to be made in writing within six months after delivery, or in case of failure to make delivery within six months after a reasonable time for delivery has elapsed.

The Facts

In the fall of 1925, H. E. Martin and W. H. Porter, the plaintiffs, who were residents of New Kent and James City Counties, Virginia, respectively, were associated as partners in the purchasing of potatoes. They had contracted to buy twenty cars of potatoes from the Michigan Potato Growers Exchange, to be delivered to them at Richmond, subject to the right of inspection at that point. (Rec., pp. 14-15.) The negotiations were conducted in Martin's name. The plaintiffs had no place of business in Richmond, but at the time of the arrival of the first car via the defendant's line, were making arrangements for the storage of the potatoes at the Bowman Transfer and Storage Warehouse on Virginia Street, which had a private siding reached by the Southern Railway. At the suggestion of J. A. Neiss, assistant chief clerk at the defendant's 9th Street Freight Office, numbers of cars then known to be in transit were listed on a written order signed by Martin, which directed that they be delivered at the Bowman warehouse. This procedure enabled the defendant to stop the cars at its Fulton Yards, and after inspection and acceptance by the plaintiffs, to deliver them to the Southern Railway for placement, thereby saving the plaintiffs switching charges which would have accrued had each car been first brought to the 9th Street Freight Yard, the usual delivery point. (Rec., pp. 15-16, 82-84, 98, 132-133.)

The shipment involved in the case, consisting of 260 sacks of potatoes loaded in car F. G. E. 41759, originated at Wyman, Michigan, on November 6th, 1925, and was consigned on a through bill of lading to the Michigan Potato Growers Exchange, Richmond, Virginia, "advise H. E. Martin," (Rec., p. 108.) Having been previously transported by the Pere Marquette Railroad and the Hocking Valley Railway, the car was in due course received by the defendant as delivering carrier and arrived at Fulton Yards on the morning of November 12, 1925, between 1 and 2 A. M. (Rec., p. 99). This particular car was not contained in the list referred to above. While notice of arrival was sent to Martin, and an inspection was made by a vegetable [fol. 3] inspector on behalf of the plaintiffs on the same day, the potatoes were then neither accepted nor rejected (Rec., pp. 40, 33, 35). On November 14th, pursuant to tariff regulations, the defendant wired the Michigan Potato Growers Exchange that the car was "unclaimed." (Rec., pp. 140, 149.)

Prior to the receipt of a reply to this telegram, the plaintiffs, on the morning of November 16th (a Monday), after taking up the shippers' draft for the potatoes at the bank, presented at the defendant's 9th Street Freight Office an order authorizing delivery to them. The freight charges, as well as two days demurrage charges which had accrued on the car at Fulton Yards, were then paid by the plaintiffs to the cashier. (Rec., pp. 17, 18, 47, 48.) Assuming that their previous dealings at the office with Neiss were sufficient direction and authorization for the placement of the car at the Bowman Warehouse, the plaintiffs apparently gave no further instructions as to disposition of the car.

In effecting delivery at the Bowman warehouse, the defendant would have to switch the car for a distance of approximately a half a mile to an interchange track (Rec., p. 100). It would then be picked up by the Southern which would take it a further distance of from a mile and three-quarters to two miles to the warehouse siding (Rec., p. 118).

It was shown that the customary practice was for the defendant's Ninth Street Office, in expedition of business, to telephone delivery orders to Fulton Yards. If the order reached the yards before 4 P. M., the defendant's portion of the movement would usually be completed on the same day, whereas if received after that hour it would be carried out the next morning (Rec., pp. 101-102). The Southern Railway yardmaster testified that a reasonable time for the completion of their movement, that is from the interchange track to the warehouse siding, would be from six to ten hours, and the car would be placed at the latter point either on the day of arrival at the interchange, or during the succeeding night. (Rec., p. 119.)

After the plaintiffs had left the 9th Street Freight Office on November 16th, a wire was received by the defendant from the Michigan Potato Growers Exchange, directing that the car F. G. E. 41759, as well as four others, which, on account of frost damage had been rejected by the plaintiffs, be released to Alfred Rose. Rose was advised by the 9th Street office that F. G. E. 41759 had already been accepted by the plaintiffs. He then gave a written order for [fol. 4] the delivery of the other four cars to the warehouse of D. S. Harwood (Rec., pp. 150, 151, 143, 144).

In some unaccountable way, probably by confusion with the other four cars, the name of D. S. Harwood was written on the delivery receipt for F. G. E. 41759. This was not done by either of the plaintiffs, who were not acquainted with Harwood, nor by Rose, nor was it done by Harwood himself. As a result the car was thereafter handled by both the defendant and the Southern Railway as if it had been actually intended to go to Harwood's warehouse. His warehouse was also reached by the Southern, although on Cary Street instead of Virginia. The car reached the interchange track on the afternoon of November 17th (Rec., pp. 99-100). Although received by the Southern on the same day, it could not then delivered to Harwood's siding, since he had facilities for receiving and unloading only one car a day, and four or five cars were already on hand ahead of this one, awaiting delivery to him. While one car was placed each night in accordance with the order of arrival, F. G. E. 41759, because of this situation, which the Southern yardmaster testified was "an unusual condition" (Rec., p. 120), was not actually placed until the night of November 23rd (Rec., pp. 118-120).

However, the car had been promptly lined up or made ready for delivery, and in compliance with the demurrage tariff, a constructive placement notice was sent to Harwood on November 18th, advising him that his free time expired on the morning of November 20th. Three days demurrage was therefore assessed against the car by the Southern on account of the enforced detention (Rec., pp. 127-128). Upon placement the potatoes were unloaded by Harwood and stored in his building. Although he was unaware of their ownership, he realized they were good for any storage which would accrue, and thought they had been sent to him by the owner who would in due course claim them. (Rec., p. 59).

On November 24th, the Bowman warehouse, through Clarence Wyatt, Jr., its manager, forwarded to Martin a memorandum warehouse receipt for the potatoes from F. G. E. 41759. On December 22nd, Wyatt wrote Martin that the receipt had been issued in error and asked for its return, stating that the potatoes were not stored at the Bowman warehouse but had been placed at Harwood's (Rec., pp. 21, 49). The plaintiffs afterwards made two trips to Richmond for the purpose of investigating the matter. After a personal inspection and check at the Bowman warehouse in company with the employe in charge, they were fully satisfied that all [fol. 5] of their potatoes were accounted for (Rec. pp. 21-24). No inquiries were made by the plaintiffs, however, at either the defendant's office or at D. S. Harwood's place of business. (Rec., p. 40).

Although the plaintiffs testified that they came to Richmond "on every other day or every third day for the whole year almost" (Rec., p. 22), and went to the warehouse regularly, they insisted that the first intimation they thereafter had that the potatoes were not at the Bowman warehouse was in the form of a letter addressed to Martin by D. S. Harwood under date of May 10th, 1926, advising that the contents of F. G. E. 41759 had been stored in his warehouse and that he wished to ascertain to whom they belonged. During this time the evidence shows that the defendant had no further information from which it would appear that the potatoes had not been ordered by the plaintiffs to Harwood's place of business.

Subsequently the matter was further investigated by the plaintiffs, and when the potatoes were finally identified by them at Harwood's, they were practically worthless, on account of having frozen, and then warmed and sprouted. A sale of such quantities of the lot as were saleable netted the amount of $70.61, after deduction of storage, handling and reconditioning charges (Rec., p. 78). It appears from Harwood's testimony that his warehouse was well suited for the storing of potatoes, that the damage was due to being left in storage for so long a period, and if removed from his place during January, 1926, they would have been in as good condition as if stored elsewhere (Rec., pp. 66-67).

The plaintiffs showed that the cost price of the shipment to them including freight charges of $208.65, was $1,755.00, and that they were worth at least the amount paid for them, plus the freight (Rec., pp. 18, 80). The verdict of the jury represented the cost price less the net proceeds of sale noted above, being the full amount claimed.

Section 2 (b) of the Uniform Bill of Lading covering the shipment which was issued by the Pere Marquette Railroad, at Wyman, Michigan, provided as follows (Rec., pp. 108, 111-112):

> "(b) Claims for loss, damage, or injury to property must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export), or in case of failure to make delivery, then within six months (or nine [fol. 6] months in case of export traffic) after a reasonable time for delivery has elapsed; provided that if such loss, damage, or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. Suits for loss, damage, injury, or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed. Provided, That in case the claim on which suit is based was made in writing within six months, or nine months in case of export traffic (whether or not filing such claim is required as a condition precedent to recovery), suit shall be instituted not later than two years and one day after notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice."

This identical provision was shown to be contained in the Uniform Bill of Lading found in the classifications adopted by each of the carriers handling the shipment, as well as in the classifications of all carriers in Official Southern and Western Classification Territories. (Rec., pp. 110, 112.) The bill of lading also recited that the goods were "received subject to the classification and tariffs in effect." (Rec., p. 113.)

Claim for damages in the instant case was shown to have been first made in writing by a letter received by the defendant's freight agent at Richmond on May 26th, 1926 (Rec., pp. 44, 52, 53). No claim was filed with any of the other carriers handling the shipment.

As to what was a reasonable time for the transportation from the point of origin and delivery to a consignee at Richmond of a shipment similar to the one involved in the instant case, the defendant's employee, Neiss, assistant chief clerk at the 9th Street Freight Office, at Richmond, testified as follows (Rec., pp. 135-136):

"Q. Mr. Neiss, the bill of lading issued covering this car shows it was consigned from Wyman, Michigan, on November 6th, and the yard records at Fulton show it arrived there on November 12th. Are you in a position to say whether or not that was a reasonable movement?

A. Yes, sir.

Q. Would you say it was a reasonable movement?

A. Yes, sir.

[fol. 7] Q. Have you had occasion in the course of your experience to handle inbound shipments?

A. About twenty years.

Q. During the course of that time have you become in a general way familiar with the time required for movements of like character as this?

A. Yes, sir.

Q. What would you say would be a reasonable time for shipment and delivery to a consignee at Richmond of a car under those circumstances from that point?

A. About eight days.

Q. Would anything beyond that be considered a delayed movement?

A. Well, yes, sir, I think it would."

As to the time for switching a car from Fulton Yards, Richmond, to the interchange track for delivery to the Southern Railway, he testified as follows (Rec., p. 136):

"Q. Mr. Neiss, Mr. Martin has testified that freight was paid on this car the morning of November 16th and order given for disposition to the Bowman Warehouse. Are you in a position to state how long it would take the C. & O. to have that order carried out to the extent of having the car sent to the interchange track?

A. Well, if we give the order to the yard any time up to 4 o'clock in the afternoon, it is usually moved up to 5:15.

Q. The same day?

A. Yes, sir, same day.

Q. Suppose the order is given after 4 o'clock, or received after 4 o'clock, at Fulton Yards?

A. It is laid over until next morning between 9 and 1 o'clock.

Q. So that the time required for the carrying out of that order by the C. & O. would be less than 24 hours?

A. Yes, sir."

Pleadings and Trial Proceedings

The action was brought by Notice of Motion with an attached verified account. A plea of the general issue accompanied by an affidavit that the plaintiffs were not entitled to recover anything was filed by the defendant. Grounds of defense, as well as notice of intention to rely upon contributory negligence of the plaintiffs, with particulars thereof, [fol. 8] were also filed by the defendant. A trial held on November 18, 19 and 20, 1926, resulted in a hung jury. A motion was then made by the defendant for the Court to enter up judgment for the defendant, on the ground that the evidence showed as a matter of law that the plaintiffs had failed to comply with a provision in the bill of lading regarding notice of claim in writing. This motion was overruled and the defendant excepted (Rec., pp. 9, 10). The evidence adduced at the trial resulting in the judgment renderd on June 6, 1927, was substantially the same as that adduced at the first trial, for which reason the evidence at the first trial has not been incorporated in this record.

At the conclusion of the evidence at the second trial, the defendant demurred to the evidence, upon the grounds then filed in writing. The court thereafter overruled the demurrer to the evidence, and entered up judgment for the plaintiffs, in accordance with the verdict of the jury, to which action of the Court the defendant duly excepted.

Assignment of Error

It is respectfully submitted that the Honorable Judge of the Law & Equity Court of the City of Richmond, Part II, erred in overruling the defendant's demurrer to the evidence and in entering final judgment for the plaintiff, instead of sustaining the said demurrer and entering final judgment for the defendant.

Argument

The opinion rendered by the Court, which was made a part of the record (Rec., pp. 161-166), discloses that the Court was governed in its action by a conclusion that the jury, from the facts, could have believed that notice of claim "was filed in time," and further that "another and more cogent reason for holding the notice in time arises on the ground of estoppel."

The defendant's contentions, all of which involve the bill of lading provision hereinbefore quoted, requiring claim for loss, damage or injury to property to be made in writing within six months after delivery or in case of failure to make delivery within six months after a reasonable time for delivery has elapsed, will be treated under the following headings:

[fol. 9] I. Evidence shows as a matter of law that plaintiffs failed to comply with bill of lading requirement as to making of claim in writing.

II. Defendant not deprived of benefit of bill of lading requirement as to making of claim in writing on ground of estoppel.

III. Burden of showing compliance with bill of lading requirement as to making of claim in writing rested upon plaintiffs.

Preliminary Statement

The shipment of goods involved moving in interstate commerce, under a through bill of lading, it is obvious that the proper construction of its terms presents a Federal question. The respective rights and liabilities of the parties, as has been often said, are to be determined by their agreements, Acts of Congress and common law principles accepted and enforced in the Federal Courts.

Chicago, etc. R. Co. v. Whitnack P. Co., 258 U. S. 369; 66 L. Ed. 665;

Southern R. Co. v. Prescott, 240 U. S. 632; 60 L. Ed. 836;

Georgia, etc. R. Co. v. Blish Milling Co., 241 U. S. 190; 60 L. Ed. 948;
C. & O. R. Co. of Indiana v. Nat'l Bank of Commerce, 122 Va. 471;
Kahn v. Amer. Ry. Express Co., 88 W. Va. 17; 106 S. E. 126.

Paragraph 11 of Section 20 of the Interstate Commerce Act as amended provides:

"That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days, for the filing of claims than four months, and for the institution of suits than two years, such period for the institution of suits to be computed from the day when notice in [fol. 10] writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: provided, however, That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

The bill of lading provision involved herein it will be noted is fully authorized under the above Act of Congress, and in fact follows the language of the act, except that the period allowed for making claim is six months instead of four months as authorized. That stipulations of this character are part of Federal regulations for interstate commerce, contravene no public policy, and are both reasonable and enforceable has been repeatedly held and cannot now be disputed.

As said in Georgia, etc. R. Co. v. Blish Milling Co. (supra):

"The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation. And, to this end, it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations."

See also

Davis v. John L. Roper Lumber Co., 269 U. S. 158; 70 L. Ed. 209;
C. & O. R. Co. v. Thompson Mfg. Co., 270 U. S. 416; 70 L. Ed. 659;
Davis v. Rogers, 139 Va. 618;
Old Dominion S. S. Co. v. Flanary, 111 Va. 816.

The proviso in the statute quoted above specifying the instances in which filing of claims cannot be required, was construed in the recent cases of Barrett v. Van Pelt, 268 U. S. 85; 69 L. Ed. 857, and Davis v. John L. Roper Lumber Co. (supra). In the latter case it was expressly held that "misdelivery" which is the basis of the cause of action in the instant case, was not included in this proviso, and that filing of claims could be required in such case.

[fol. 11]

I

Evidence shows as a matter of law that plaintiffs failed to comply with bill of lading requirement as to making of claim in writing.

Bearing in mind that in the instant case claim was first made in writing on May 26, 1926, there are two possible dates which, under different views, might conceivably be taken as the starting point of the period designated in the bill of lading as "reasonable time for delivery".

(1) If this period be calculated from November 6, 1925, the date on which the goods were tendered for shipment to the Pere Marquette, the initial carrier, at Wyman, Michigan, it will be seen that six months and twenty days had elapsed before claim was made. This view regards the phrase as applying to the entire transportation movement.

(2) The plaintiff it will be remembered did not accept the shipment on November 12, 1925, the date of its arrival at Fulton Yards, but delayed acceptance until November 16, on which date free time had expired and two days demurrage had accrued. On the latter date they actually saw the potatoes at the yards. They are now complaining of a failure to execute an order presumed to have been given by them on that date. They then knew that the only addi-

tional handling required was a switching movement from the yards to the Bowman warehouse siding, a distance of about two and a half miles, a movement requiring for its completion, at the most, two days. If, under the facts of this case, "reasonable time for delivery" be construed as applying to this movement alone, and therefore be calculated from November 16, 1925, it will be seen that six months and ten days elapsed before claim was made.

Whatever construction is placed on the phrase in question, it necessarily follows that being a part of a through bill of lading, it must be construed with the same effect as to the initial, connecting and terminal carriers. Nor can the effect of the stipulation be escaped by the form of action chosen by the plaintiff.

Georgia, etc. R. Co. v. Blish Milling Co., 241 U. S. 190; 60 L. Ed. 948.

[fol. 12] Whichever one of the two starting points is taken, it is submitted that six months and a "reasonable time for delivery" had fully elapsed and expired before claim was made by the plaintiffs.

What is a "reasonable time for delivery" depends of course upon the circumstances of the particular case to which the inquiry is directed. It is often stated that among the facts which may be considered are the mode of conveyance, the distance, the season of the year, the nature of the freight and the ordinary facilities which the carrier has for transportation.

10 Corpus Juris, pp. 286-287;
4 Elliott on Railroads (3d Ed.), Sec. 2231-2232;
McGraw v. B. & O. R. Co., 18 West Va. 331; 41 Amer. Rep. 696.

Where the evidence relevant to the inquiry is conflicting, the question, like any other issue of fact, should be submitted to the jury. But where the facts are undisputed and only one reasonable conclusion or inference can be drawn from them, it is quite plain that it is incumbent upon the Court to determine the inquiry as a matter of law.

Davis v. Rodgers, 139 Va. 618.

As to the meaning of "reasonable time" in general, it was said in First National Bank v. Pipe Co., 273 Fed. 105:

"The meaning of the phrase 'reasonable time' is not doubtful; it is such time as is necessary conveniently to do what the contract requires should be done * * *. The subject matter often times suggest a rule or meaning; thus it was said in Illinois, etc. R. Co. v. Mulberry, etc.; 238 U. S. 280; 'What is a reasonable time is to be determined in view of the requirements of interstate commerce.'"

See also

Va. Hot Springs Co. v. Schreck, 131 Va. 581.

"Delivery" as applied to the shipment involved, does not include actual unloading or manual receipt of the goods. It means placement to such an extent that the consignee or his agent is charged with the duty of taking the next step. [fol. 13] Nor would it include actual placement where constructive placement as defined in the tariff is effected by the carrier.

The Honorable Judge of the lower court took the view that in the instant case "reasonable time for delivery" was to be construed with reference to the entire transportation movement of the shipment from Wyman, Michigan to the warehouse in Richmond. He held that the testimony of the defendant's witness Neiss that eight days was a reasonable time for delivery, and that anything beyond eight days would be a delayed movement, was not binding upon the court or jury, but that it still might be inferred that twenty days would represent a reasonable time.

This witness was shown to have had about twenty years experience with the defendant company in handling inbound shipments, and to have become familiar with shipments of the character involved. Counsel for the plaintiffs evidently had no doubts as to the correctness of his statement of what was a reasonable time, for although interrogating him freely as to other facts, he studiously avoided any cross-examination on this feature of the case. There is absolutely no evidence of a contradictory nature in the entire record. The plaintiffs, during the same season having brought nineteen other cars of potatoes from the shipper of this car, were certainly in position to know if Neiss' testimony was in accord with their own experience. Although both of them were examined in chief and in rebuttal, neither purported to say that his statement was incorrect.

Neiss was corroborated by the fact that the car in question reached the Richmond yards within six days after shipment at Wyman, Michigan, and except for the delay caused by the plaintiffs could surely have been placed within two succeeding days.

The goods were perishable in nature and there was every reason why the carriers should expedite delivery. The four cars which were refused by the plaintiffs after inspection, were rejected on account of frost damage, and it was urgent that damage of this character be minimized.

That even on a demurrer to the evidence the demurring party does not waive his own parol proof which is not in conflict with that presented by the opposing side, is well settled in Virginia. As was said in the case of Farmer's Adm'x v. C. & O. R. Co., 144 Va. 65, at pages 91-92:

> "The demurrant does not give up his parol evidence which is not in conflict with that of the demurree. He may [fol. 14] supply gaps and fill in deficiencies in the evidence of the demurree, and show other independent affirmative facts, provided only they do not conflict, directly or indirectly, with the evidence demurred to. Furthermore in drawing inferences favorable to the demurree, the court can draw only such inferences as a jury might have fairly drawn from the evidence. The court is not bound to draw inferences that are strained, forced, or contrary to reason. Parrish & Co. v. Pulley, 126 Va. 319; 101 S. E. 236; Bowers v. Bristol Gas Co., 100 Va. 533; 42 S. E. 297. Nor is the court called upon to believe the incredible. Ches. & O. R. Co. v. Anderson, 93 Va. 650; 25 S. E. 947; Va. & S. W. R. Co. v. Skinner, 119 Va. 843; 89 S. E. 887."

It is respectfully submitted that the inference drawn by the court that twenty days might be a reasonable time for the movement of the shipment, was without any evidence to warrant it, and directly contrary to proof bearing every guarantee of credibility, and that the court should have found as a matter of law that the plaintiffs had failed to file claim in writing within the period prescribed by the bill of lading provision.

The cases of C. & O. R. Co. v. Barger, 112 Va. 688, and Clopton's Case, 109 Va. 813, cited in the opinion of the lower court, are in no way applicable to the situation existing in the instant case. In the former case it was actually held that the jury was not required to believe the opinion of a physician when "his view is in direct conflict with other expert testimony and circumstances adduced by the plaintiff". In Clopton's Case, after the prosecution has established a prima facie case of the unlawful sale of intoxicating liquor, the defendant attempted to disprove the charge by a verbal denial by himself and his clerk that he had sold or had in his store any intoxicating liquors. Aside from the natural intent and bias of the witnesses, their testimony was in conflict with other proof already presented by the prosecution, and of course was not conclusive.

In any consideration of the facts of the instant case, the case of Davis v. Rodgers, 139 Va. 618, is singularly in point. That case represented an action for damages for the loss of a portion of a consignment of 170 bales of cotton shipped in interstate commerce. The bill of lading issued contained the identical provision found in the instant case, requiring the making of claim in writing within six months after the delivery or within six months after a reasonable [fol. 15] time for delivery has elapsed. While there was several assignments of error in the case, all of them dealt with the effect of this provision.

In the course of an exhaustive opinion, Judge Holt, speaking for the Special Court of Appeals, said at pages 622 to 626:

> "We should bear in mind that the limitation in the bill of lading is not that the plaintiffs shall have six months after delivery and a reasonable time in which to give notice of loss, but that this notice must be within six months after a reasonable time for delivery has elapsed. When a reasonable time for delivery had passed he had six months and no more in which to give notice, and this brings us back to the question as to what was reasonable time for delivery in the instant case.
>
> Ayden is 136 miles from Norfolk. Cotton was delivered there on November 7, 1919, consigned to plaintiffs. The record showed that it moved forward towards its destination

on the following day. Five bales were lost; how, why, when or where we do not know. A reasonable time for it to continue in transit is fixed by witnesses at from three to seven days; seven being the outside limit. It also appears that at times cotton has remained on the platform at Ayden as much as ten days before being forwarded, though there is nothing to show that anything of this kind happened to the cotton in question. It does appear to have been shipped on the day following its receipt. Evidence for the plaintiff is that thirty days would have been an unreasonable time to be consumed in such a shipment. Taking the extreme and assuming that this cotton, after delivery, remained at Ayden for ten days and that it took seven days to carry it to Norfolk, we have seventeen days at the outside to be taken up in such a transaction, and outside time is not reasonable time. The notice in writing required was given on August 14, 1920, and this suit instituted on February 28, 1922; that is to say, the notice instead of being given seventeen days after shipment, was given ninety-seven days thereafter. Of course this time is in addition to the six months given by the contract.

The fact that the jury has a right to consider all the circumstances in the case is stressed. This is entirely true, but the circumstances which it may consider must be of evidential value. Under the guise of considering circumstances it is not left free to roam at will. The verdict must rest on facts proven, fair inferences therefrom or circumstances [fol. 16] having a tendency to establish the necessary facts. Where affirmative relief is asked it must affirmatively appear that the verdict at least rests on some one of these foundations. Of course no verdict can be disturbed unless it is contrary to the evidence or without evidence to support it, and for a stronger reason when the evidence is conflicting it must stand. Let us examine these circumstances.

It is said that there is at times delay in barging over cotton from Pinner's Point to Norfolk; but this shipment was made in the busy season. Barges run when they can get from forty to sixty bales. There could have been but little delay on this account, and these witnesses who testified that seven days at the most would be reasonable, took this into consideration. It is also said that there is sometimes delay in beginning a shipment of cotton during the busy season. Allowance has been made for this. It is also said sometimes shipping directions are rubbed out, and when this occurs railroads are entitled to additional time for delivery, and 'a reasonable time' is thereby extended. But what is a reasonable time for delivery is not a time contingent upon the possible existence of unusual conditions. Neither the plaintiff nor the jury had the right to assume them. As a matter of fact there is nothing to show that they did exist nor what was the cause of non-delivery, and after all we come back to this. What time was reasonable?

It is to be remembered that it was not necessary to give notice within a reasonable time after shipment, but within six months after a reasonable time for delivery has passed. The cotton season ended in January, accounts were then cast up, this shortage, if not known before must have been apparent then and yet notice was not given until August. Again, if reasonable time for delivery was stayed by inability to deliver, this rule, so far as lost property is concerned, would be a dead letter.

It was always possible at the end of each day for the plaintiff to tell just how much cotton was short, but it is said that for convenience this was not done until the end of the busy season, or in January. It was then the custom of these factors to ascertain their loss, present their claims to the railroad and receive from any cotton on hand belonging to unknown owners, an amount sufficient to make up the shortage.

As a matter of fact, it does not appear from the evidence that the defendant made any demand until August 14, 1920. In other words, they invoke a custom not followed and one, which, if followed, would have given actual notice of the [fol. 17] loss and afforded the railroad some opportunity to protect itself.

'Nor can the period of limitation be extended for lack of discovery of the loss. Negligence and unnecessary delay in the assertion of claim for losses in transportation are the evils against which the limitation provides.' Kahn v. American Railway Express, 88 W. Va. 17; 106 S. E. 126.

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After all each case is governed by its own evidence. A jury cannot say that ninety-seven days is a reasonable time in which to ship cotton from Ayden, N. C., to Norfolk, Virginia, when the evidence puts seventeen days as the outside limit and when the plaintiff's own witnesses state that thirty days would be unreasonable.

* * * * * * *

There was nothing for the jury to pass upon and any of the methods of procedure heretofore suggested as proper in such cases might have been adopted."

The judgment rendered in the plaintiff's favor by the trial court was necessarily reversed and final judgment rendered for the defendant. It is submitted with full confidence that this case is in all respects controlling of the result in the instant case.

The case of Lazarus et al. v. New York Central R. Co., 278 Fed. 900, and 299 Fed. 599, was a suit based upon the failure to deliver certain slabs of tin which had been consigned from Seattle to New York City. The goods were tendered to the initial carrier for shipment on June 17, 1917, and a portion of them were delivered on August 21, 1917. The usual time for such transportation was shown to be from 20 to 23 days. Suit was instituted on September 29, 1919, and the carrier as a defense relied upon a bill of lading provision requiring suit to be brought within two years after a reasonable time for delivery has expired. On a second trial in the lower court, the plaintiff asked to submit to the jury the question whether two years had elapsed before the action was brought and after a reasonable time for the delivery of the missing goods. The trial judge denied this motion and granted the defendant's motion for a directed verdict.
[fol. 18] On appeal to the Circuit Court of Appeals, that Court said:

"We held in First National Bank v. Pipe, etc. Co., 273 Fed. 105, that where the facts are clearly established, or are undisputed or admitted, reasonable time is a question of law, and therefore to be decided by the Court. Of course there are circumstances when the answer to the query of reasonable time depends upon conflicting facts, and even conflicting opinions. For example, see Goddard v. Crefield Mills, 21 C. C. A. 530; 75 Fed. 818.

In this case there are no disputed facts at all. Indeed the only thing unknown in the whole story as told in our previous decision is how, when and where plaintiff's goods disappeared from the carrier's custom. Under such circumstances it was for the court to say when the reasonable time expired, and when therefore, the two-year period of limitation began to run. In the case first above cited we pointed out that to call the determination of such a question a matter of law is not perhaps strictly logical, but it is at all events thoroughly understood.

We agree with the trial judge that a reasonable time for the delivery of these goods expired more than two years prior to the institution of action. Therefore the judgment is affirmed, with costs."

In the case of Herring Bros. Inc. v. Amer. Railway Express Co., 192 N. Y. Supp. 871, it was shown that on March 11, 1919, the plaintiff had tendered to the defendant carrier at New York City a bale of woolens for shipment to a merchant at Philadelphia. The receipt issued by the defendant contained a provision requiring claim to be made in writing within four months after a reasonable time for delivery had elapsed. Notice of the non-delivery of the goods was first received by the plaintiff by a letter from the Philadelphia concern dated July 26, 1919. The plaintiff in proper form notified the defendant of its claim on July 29, 1919. After stating that this notice was 4 months and 18 days after the date of shipment, the Court, in reversing a judgment for the plaintiff, said:

"Defendant produced evidence to establish the fact that a reasonable time within which a shipment from New York City should have been delivered in Philadelphia, Pa., at that time, was 2 days, or at most 3 days, that there was no con- [fol. 19] gestion at either end, or on the railroad and that no strike or unusual condition existed.

* * * * * * *

"In my opinion there is not sufficient evidence in the record to sustain a finding that plaintiff made the claim with a reasonable time. It is true that the shipment was forwarded only about 4 months after Armistice Day; but, even if the court below took judicial notice of the fact that during the war period the railroads generally were congested by reason of shipments of war materials, and that many delays resulted, still the presumption that that condition existed up to and including March 11, 1919, cannot be indulged in, in view of the direct and uncontradicted evidence that deliveries were made at that time from New York City to Philadelphia, Pa., within 3 days. Consequently the finding in plaintiff's favor is against the weight of evidence, and the judgment should be reversed and a new trial ordered."

Kahn v. Amer. Ry. Express Co., 88 West Va. 17; 106 S. E. 126, was an action of assumpsit against a carrier for the loss of a portion of a shipment of furs, tendered by the plaintiff to the defendant at Bluefield, West Virginia, for transportation to New York City. The goods were shipped on October 5, 1918, and the package from which the lost articles were stolen was delivered to the consignee within three days. The furs in question were a part of a lot shipment sent to the plaintiff on consignment, with the right to return such portions as should not be desired. Settlement was not made between the plaintiff and consignee until about April 1, 1919, at which time the shortage and loss were discovered, and claim for compensation was made upon the defendant very soon afterward. Liability was denied upon the ground that the plaintiff had failed to assert or make claim in writing within four months after a reasonable time for delivery had elapsed, as provided in the contract of affreightment.

In affirming the judgment of the lower court, rendered for the defendant, upon a demurrer to the plaintiff's evidence, which was based upon this defense, the Supreme Court of Appeals of West Virginia said:

"The circumstances and character of the loss do not render it exceptional and the limitation inapplicable. There can be no difference in principle, as regards the duty to [fol. 20] exercise diligence, between the loss of an entire package of goods and a part of a package, nor between loss by theft and loss in some other way, resulting in non-delivery. The terms are general and cover all instances of failure to deliver. The terms 'failure to make delivery' have been authoritatively defined as being 'fully adequate in their literal and natural meaning to cover all cases where the delivery has not been made as required'. Mr. Justice Hughes, in Ga. Fla. & Ala. Ry. Co. v. Blish Milling Co., cited.

Nor can the period of limitation be extended for lack of discovery of the loss. Negligence and unnecessary delay in the assertion of claims for losses in transportation are the evils against which the limitation provides. It allows a reasonable time for discovery of the loss and preparation of the claim, and the claimant must avail himself of it. Otherwise, the regulation would be useless and ineffective. Inability to discover the loss in time is not claimed. That it could have been discovered immediately after the happening thereof is obvious. A letter, or telegraphic or telephonic message, of inquiry would have disclosed it in ample time. Whether nearly 60 days is 'a reasonable time for delivery', in transportation by express-carrying trains between Bluefield and New York, is a question about which there cannot be the slightest doubt. The package was delivered within three days. That a period of one or two months suffices is so clearly manifest as to leave no room for two different and intelligent opinions. In all such cases, the function of the jury may be dispensed with and the question disposed of by the court as one of law. Schoonover v. B. & O. Ry. Co., 69 W. Va. 560; 73 S. E. 266, L. R. A. 1917F, 1, Ann. Cas. 1913B, 964; Hysell v. Central City, 68 W. Va. 769; 70 S. E. 767. Reasonableness of time for performance of an act of any kind is governed by the general rule as to the functions of court and the jury. Detroit Steel Products Co. v. Daily Telegraph Printing Co., 102 S. E. 139; Craft v. Isham, 13 Conn. 28; Manufacturing Co. v. Brower, 49 N. C. 429."

The case of R. P. Hazzard Co. v. Maine Central R. Co., 121 Maine 199; 116 Atl. 258, was an action for the loss of two cases of shoes, constituting a portion of a shipment of goods consigned by the plaintiff at Gardiner, Maine, to forwarding agents at Boston. The shipment was started on May 13, 1918, and the balance of the goods arrived at Boston on May 15, 1918. The missing goods were never found and no reason was given for their nondelivery. The plaintiff was not advised of the shortage until November 25, [fol. 21] 1918. On November 27, 1918, it sent a letter to the defendant asking that the goods be traced and on December [illegible], 1918, formal claim was presented.

In sustaining the defendant's contention, that the plaintiff was barred from recovery by a bill of lading requirement that claim be made in writing within six months after a reasonable time for delivery had elapsed, the Court said:

> "What is meant by 'a reasonable time for delivery'? When does that time cease and the six months period begin? The plaintiff argues that as this is a claim for entire failure of delivery and naturally cannot be made in good faith until after the expiration of such a period as would indicate a strong probability that the goods would never in fact be delivered, in other words, until after it is found that they had been lost beyond a reasonable probability of tracing them, therefore the six month period should not begin until all that preliminary time has expired. This construction ignores the plain words and obvious meaning and purpose of the stipulation. It would postpone the beginning of the six-months period until not a reasonable but an unreasonable time for delivery has passed; that is until the expiration of all conceivable delay in transportation and all hope of delivery has been abandoned. This view we cannot accept. The words of the condition forbid it."

Freeman v. A. C. L. R. Co., 120 S. C. 199; 113 S. E. 69, was an action for damages for the loss of 13 gallons of spirits of turpentine alleged to have leaked from barrels shipped by the plaintiff from Cummings, South Carolina, to Savannah, Georgia, and delivered at the latter place on July 13, 1920. No exception was taken to the shipment when delivered, and claim was not filed until January 25, 1921, which was six months and fifteen days after delivery. It was held that the plaintiff was barred from recovery by the bill of lading provision requiring claim to be made within six months after a reasonable time for delivery had elapsed.

See also

Bronstein v. Payne, 138 Md. 116; 113 Atl. 548;

Metz Co. v. Boston & M. R. Co., 227 Mass. 307; 116 N. E. 475;

Goodwin & Jean v. Amer. Ry. Express Co. (Mo.), 294 S. W. (100);

[fol. 22] Allen v. Davis, 125 S. C. 256; 118 S. E. 614.

In the case of Old Dominion S. S. Co. v. Flanary, 111 Va. 816, which involved the loss of a shipment of goods consigned from New York City to Wise, Virginia, a bill of lading provision required claim to be made in writing within "thirty days after the delivery of the property or after due time for the delivery thereof." The plaintiff did not even contend that it had complied with this provision, but claimed that the defendant waived compliance. The Court, in reversing a judgment for the plaintiff, said at pages 822-823:

"The shipments were made on the 5th day of September. According to the weight of evidence, the goods should have arrived at their destination at Wise, Va. on or about the 15th. But if fifteen days instead of ten be allowed as a reasonable time to cover their transportation, still the notice would be insufficient, for the notice was filed by the H. B. Claflin Company on behalf of C. F. Flanary & Co. on October 23, 1906, and by Dunham & Co. on behalf of C. F. Flanary & Co. on October 27, 1906."

From this quotation it plainly appears that this court recognized that where fifteen days was taken as a reasonable time in which to transport the goods, a claim not filed until three days later would necessarily be barred as a matter of law. This case arose of course prior to the enactment of the present Federal statute hereinbefore quoted, which prohibits the limitation of the period for filing claim to less than four months.

Other cases in Virginia, in which bill of lading provisions similar to that involved in the above case have been upheld, are not lacking.

Liquid Carbonic Co. v. N. & W. R. Co., 107 Va. 323; 58 S. E. 569; 13 L. R. A. (N. S.) 753;

A. C. L. R. Co. v. Bryan, 109 Va. 523; 65 S. E. 301;

Va.-Carolina Chem. Co. v. Southern Express Co., 110 Va. 666, 66 S. E. 838.

The authorities to which reference has been made, are, it is submitted, amply sufficient to show that under the facts of the instant case, as a matter of law, six months and more than a reasonable time had elapsed before claim was filed.

If the view be adopted that "reasonable time for de- [fol. 23] livery" applies only to the final movement from Fulton Yards to the Bowman warehouse, it is quite obvious that the plaintiffs still have failed to make claim within the allowed time. The testimony of both C. & O. and Southern employees charged with the duty of carrying out this movement shows conclusively that forty-eight hours would be ample time for its performance, whereas the claim was made six months and eight days after this period had ended.

Some stress may be laid by the plaintiff in the present case upon the fact that the Bowman warehouse only had the capacity for unloading one car at a time, that other cars might have been ahead of the car involved in the suit, and that actual delivery might not have been made for as much as ten days. It may also be contended that the plaintiffs were not residents of Richmond, and they would not be present in person when the car was unloaded, and hence should be allowed additional time in which the warehouse proprietor could communicate with them in the event that the car did not appear promptly.

In the first place, under the evidence, to assume that other cars would delay the placement of this car would be to assume unusual conditions, and as said in Davis v. Rodgers, (supra):

"But what is a reasonable time for delivery is not a time contingent upon the possible existence of unusual conditions. Neither the plaintiff nor the jury had the right to assume this."

Furthermore, it was shown that in any event the warehouse proprietor would have promptly received a constructive placement notice as provided by the tariffs, that demurrage would have been assured after forty-eight hours free time even though the car had not reached the warehouse.

But it is also perfectly obvious, that where, by undisputed testimony, the carrier is prepared and ready to complete delivery within two or three days at the utmost, the consignee is certainly not entitled to rely upon his own or his agent's inability because of lack of facilities to accept delivery, as extending the period for filing claim. This is not a proper element to be considered in determining what is reasonable time for delivery.

The principle is well illustrated by the cases involving the question of whether or not reasonable time has been allowed the consignee in which to accept delivery and remove the goods.

[fol. 24] In 4 Elliott on Railroads (3d Ed.), Sec. 2299, it is said:

> "In determining what is a reasonable time, regard must usually be had to the requirements of commerce, to usage and custom, and to the demands of business for both the carrier and consignee must be deemed to contract and to act with reference to such matters. Their respective rights and duties cannot be justly ascertained and determined without giving to such matters due consideration. On the one hand, the carrier is chargeable with notice that the affairs of commerce and business require that it keep the goods for the consignee for such a time as will enable him to remove them, while, on the other hand, the consignee is bound to know that the course of business and the requirements of commerce impose upon him the duty of exercising care or diligence, hinder or embarrass it in the performance of that duty. There are cases in which the question whether diligence, hinder or embarrass it in the performance of that duty. There are cases in which the question whether a reasonable time has been allowed in which to remove the goods is a question of fact, but in many, perhaps in most, instances, where the facts are undisputed, it must be, it seems to us, a question of law inasmuch as matters of which the courts take judicial notice enter so largely into it. We think it may be safely said that the general rule is that where the facts are undisputed and but one reasonable inference can be drawn from them, or, perhaps, where the controversy is controlled by custom and usage, or depends upon facts of which the court takes judicial knowledge, the question is one of law, but in other cases it is one of fact. It has been said that what is meant by a reasonable time is such as would give a person residing at the place to which the goods are consigned, and informed of the usual course

of business on the part of the company, a suitable opportunity within business hours after the goods are ready for delivery, to come to the place of delivery, inspect the goods and take them away."

And in a note to this section it is said:

"But it is held that the fact that the consignee's residence or place of business is at a distance from the depot, or that he is unable to secure draymen at the time, or the like, will not extend the time. Columbus, &c., R. Co. v. Ludden, 89 Ala. 612; 7 So. 471; Chalk v. Charlotte, &c., R. Co., 85 N. Car. 425."

[fol. 25] And in Columbus & W. R. Co. v. Ludden, 89 Ala. 612; 7 Sou. 471:

"In determining the question as to how long the carrier's liability as such will continue after the property has reached its destination and is ready for delivery, the peculiar circumstances and environment of the consignee cannot be considered. His convenience or necessities, proximity or remoteness of his residence or place of business to the point of consignment are matters of no importance in reaching a conclusion on this point. The law proceeds, not unreasonably, on the assumption that he has been already advised of the shipment, and wherever he lives or engages in business, he will seasonably appear and claim and remove his property. So that it is not of moment in this case that the consignee resided at a distance of 28 miles from the place of delivery."

"Her rights, and the degree of the responsibility resting on the defendant, were the same in all respects as if she had resided in the Town of Goodwater, to which the shipment was made."

Although the plaintiffs themselves in sending their potatoes to a storage warehouse may have had no occasion to be thereafter concerned with them, which, however, is contrary to their testimony, it is apparent that their warehouseman at least was at once chargeable with notice that the potatoes had not been delivered. The duty to investigate the situation certainly could not be neglected by both, so as to thereby increase the obligation of the carrier.

Cases in which carriers have been sued for loss or damage to goods on account of delay in transportation are of course analogous to the instant case. The general rule laid down in these cases is that a carrier's obligation is to make delivery with reasonable dispatch. The duty is of course particularly important with respect to perishable goods.

4 Elliott on Railroads (3d Ed.), Sec. 2238;
10 Corpus Juris 290;
N. Y. P. & N. R. Co. v. Chandler, 129 Va. 695.

Certainly in the face of an admitted movement of one car of potatoes between two points within six days, it would be most difficult for a carrier to persuade either court or jury [fol. 26] that twenty days would be a reasonable time for the very same movement. It could only escape liability for damage thereby accruing, by proof of most extraordinary circumstances which made the delay unavoidable. No such circumstances were shown to have existed in the present case. And the situation would be equally embarrassing for a carrier endeavoring to show that for a movement customarily requiring forty-eight hours, a period of ten days would not necessarily be an unreasonable time.

II

Defendant not deprived of benefit of bill of lading requirement as to making of claim in writing on ground of estoppel.

The opinion rendered by the Honorable Judge of the lower court further states (Rec., p. 163):

"Another and more cogent reason for holding the notice in time arises on the ground of estoppel."

In support of this conclusion, his Honor states that the defendant having accepted an order to deliver the potatoes to a warehouse, "presumably and naturally for storage", the plaintiffs were thereby lulled into a feeling of security from which "they were not awakened until May 25, 1926 * * *." (Rec., p. 164.)

During the latter part of December, 1925, which was about a month after the potatoes had been stored at the Harwood Warehouse, the following letter was admittedly received by the plaintiffs from the Manager of the Bowman warehouse (Rec., p. 49):

"Richmond, Va., Dec. 22, 1925.

H. E. Martin & Co., Lanexa, Va.

Gentlemen: Thru error we mailed you under date of Nov. 24th, our warehouse Memorandum receipt for 260 bags Potatoes from Car FGE 41759.

[fol. 27] This car was not stored in our warehouse but was placed in the warehouse of D. S. Harwood, and we ask that you return us this receipt, which you will find is numbered N. G. 6494.

Wishing you a very merry Christmas, and with the personal regards of the writer, we are,

Yours very truly, The Bowman Transfer & Storage Warehouse Co. Clarence Wyatt, Jr.

CWJr. PDC."

This letter, it will be seen, unequivocally told the plaintiffs not only that the potatoes in question were not at the *Bowman warehouse*, but further that this car had been placed at Harwood's warehouse. At this time, the testimony of Harwood shows very plainly, the potatoes were in as good condition as they would have been if stored in any other warehouse, and had the plaintiffs brought to the attention of the defendant the information contained in the letter, the potatoes could have been moved at slight expense. In addition, the plaintiffs also frankly admitted that they were in Richmond nearly every third day during the year, presumably going to the Bowman warehouse on the occasion of each trip. They stated that their potatoes were so arranged that it was easy for them to check and count what they had on hand, and that they kept account of them. Yet they even sold the major portion of their stock without noticing that they were a carload short. It is quite difficult, in view of these facts, to understand how the court could find that the plaintiffs were lulled into any feeling of security from which they did not awake until May 25, 1926.

On the other hand, the defendant had no means of knowing that a mistake had been made. Its records indicated in proper form that the potatoes were ordered to Harwood's warehouse, and investigation would have developed as it subsequently did, that they had been so delivered. The defendant had made a misdelivery, but there was nothing in its conduct which prevented the plaintiffs from ascertaining this fact. It withheld no information, nor was any inquiry made of it concerning the transaction, and it is sub- [fol. 28] mitted that there are no facts on which the defense of estoppel can be predicated.

Except for the fact that no charge was made for the movement to the warehouse, the situation was exactly the same as though the potatoes had been originally tendered to the defendant at Fulton Yards for delivery at the warehouse, and it had failed to make such delivery. It was the same as though the consignor in Michigan had specifically directed that the car be delivered at the Bowman warehouse and it had gone elsewhere. In either instance there would be nothing more than a misdelivery.

But whatever might be the effect of the defendant's omission or failure to perform its duty, viewed from a purely private contractual standpoint, it has been conclusively determined by the Supreme Court of the United States that a bill of lading provision of this very character cannot be waived, nor can the carrier's conduct vary the terms of the bill of lading by estoppel.

In Georgia, F. & A. R. Co. v. Blish Milling Co., 241 U. S. 190; 60 L. Ed. 948, which was an action based upon the misdelivery of a shipment of flour, it was said in regard to a provision similar to that involved in the instant case except that the limitation period was four months instead of six:

"But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed. Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 166; 56 L. Ed. 1033, 1038; 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Kansas City Southern R. Co. v. Carl, supra; Atchison, T. & S.

F. R. Co. v. Robinson, 233 U. S. 173, 181; 58 L. Ed. 901, 905; 34 Supt. Ct. Rep. 556; Southern R. Co. v. Prescott, supra."

This case is undisputed authority for the proposition that misdelivery of a shipment cannot furnish ground for the interposition by a shipper of a plea of estoppel in opposition to the bill of lading provision relied upon.

[fol. 29] In the case of Texas & Pacific R. Co. v. Leatherwood, 250 U. S. 478; 63 L. Ed. 1096, the Supreme Court reiterated:

"The parties to a bill of lading cannot waive its terms, nor can the carrier by its conduct give the shipper a right to ignore them."

The language taken from both of the above cases was quoted with approval by the Virginia Special Court of Appeals in the case of Davis v. Rodgers (supra).

Other state courts have as to interstate shipments uniformly applied the rule of the Blish case.

In the case of Metz Co. v. Boston & M. R. Co., 227 Mass. 307; 116 N. E. 475, certain castings shipped from a point in New York to Waltham, Mass., were lost in transportation. The bill of lading adopted by the defendant carrier and filed with its tariffs provided that claims must be made in writing within four months after a reasonable time for delivery had elapsed. It was alleged that the defendant had waived this provision and the jury made an express finding to this effect. In reversing a judgment for the plaintiff, the Court, in quoting the language quoted above taken from the Blish Case, said:

"These words are exactly applicable to the facts here presented. They were used in the course of a decision respecting a clause in a bill of lading in effect the same as that here involved. While the facts of that case were slightly dissimilar to those of the case at bar, they are not different in substance, and they call for the operation of the same principles of law. It cannot be presumed that the words just quoted were used inadvisedly or without a full appreciation of the natural force to be attributed to the comprehensive reference to waiver in that connection. This decision appears to mean that, when the form of the bill of lading with its numerous contractual provisions has been filed according to law, with the Interstate Commerce Commission, and the interstate rate for transportation has been fixed with reference to the terms and obligations of that uniform bill of lading, then those contractual terms and obligations become a part of the rate established and neither party can depart from them. The shipper and the carrier become bound inexorably by them. This decision was foreshadowed by Southern Ry. Co. v. Prescott, 240 U. S. 632; 36 Sup. Ct. Rep. 469; 60 L. Ed. 836; Kansas Southern Ry. [fol. 30] v. Carl, 227 U. S. 639; 33 Sup. Ct. 391; 57 L. Ed. 683, and Chicago & Alton R. R. v. Kirby, 225 U. S. 155; 32 Sup. Ct. 648; 56 L. Ed. 1033, Ann. Cas. 1914A, and perhaps in other decisions. Waiver by the railroad of an obligation resting on the shipper or consignee would operate to that extent to create a preference in favor of that particular shipper or consignee and a discrimination against all others, to whom a like concession is not made. But it is the plain purpose of the Interstate Commerce Act and its amendments to prevent all favoritism by the carrier toward shippers and to put all shippers on the same footing. The public policy of the country has been declared to this end in no unmistakable terms in numerous decisions."

The case of Bronstein v. Payne, 138 Md. 116; 113 Atl. 648, was an action against a carrier for the value of a bale of woolen rags, accepted by the defendant at Baltimore, for transportation to New York City, but never delivered at the latter point. The defendant denied liability on the ground of failure to file written claim within six months after a reasonable time for delivery had elapsed, as provided in the bill of lading.

It was shown that the lost bale was a portion of a shipment of nine bales. Within sixty days from the date of shipment, the consignee forwarded to the defendant company at New York the bill of lading and freight bill covering all nine bales, stating that only eight were received, and asking that the missing bale be traced. The bill of lading and freight bill were mislaid by the defendant, and although the consignee's representative went to the defendant three or four times to get the papers back for the purpose of filing claim, they were not returned until more than six months later. The shipper then filed claim on the following day, which was more than eight months subsequent to the date of shipment.

In approving a prayer granted at the instance of the defendant which "ignored the testimony tending to show that the carrier had waived the requirements of the bill of lading" covering the shipment, or had by its conduct estopped itself from asserting them, the Court said:

> "The shipment in this case was made under and was subject to the federal statutes relating to interstate commerce, and the bill of lading was described as the 'standard bill of lading,' and was issued pursuant to the authority of the Interstate Commerce Act and the amendments thereof. Its [fol. 31] force and the nature and extent of the obligations created by it are federal questions, and in passing upon them we are bound to accept as final the construction and the interpretation placed by the United States Supreme Court upon those laws and things done pursuant to the authority thereof. This Court decided January 13, 1914, that provisions similar to those in the bill of lading under consideration could be waived. Peninsula Prod. Exch. v. N. Y. P. & N. R. R., 122 Md. 231. That decision rested upon what was the weight of authority, and upon principles of natural justice, and until the question had been finally settled by the Supreme Court of the United States, we were bound by it. The question however did come before the Supreme Court in the case of the Georgia, Florida & Alabama R. R. Co. v. Blish Milling Company, 241 U. S. 190, where it was decided that 'the parties could not waive' the provisions of such a bill of lading nor could 'the carrier by its conduct give the shipper the right' to ignore them, and in Texas Pac. R. Co. v. Leatherwood, 250 U. S. 478, the court again stated and emphasized the proposition that a common carrier engaged in interstate transportation could not by its conduct estop itself from asserting the provisions of a bill of lading issued under the authority of the Interstate Commerce Act in reference to the relative rights and obligations of the carrier and the shipper in respect to any shipment covered by such a bill of lading. These decisions appear to rest upon the theory that in order to support the policy of the statutes to which we have referred, the terms and provisions of bills of lading issued in pursuance of the authority contained in them must be regarded as the final

and exclusive expression of the parties to such bills of lading in regard to their relative rights and obligations arising or existing in reference to the shipment covered by the bill of lading, and that all other considerations should be subordinated to that end, that is to making effective the policy of the Interstate Commerce Act. These decisions conclude the question under consideration, for where a question is federal in its nature, the decisions of the Supreme Court of the United States are absolutely binding upon the various state courts and must be followed."

See also

Amer. Ry. Express Co. v. Roberts, 28 Ga. App. 510; 111 S. E. 744;
[fol. 32] Rogers & Co. v. East Carolina R. Co., 186 N. C. 86; 118 S. E. 885;
Hubbard Grocery Co. v. Payne, 94 W. Va. 271; 118 S. E. 152;
Allen v. Davis, 125 S. C. 256; 118 S. E. 614;
Amer. Ry. Express Co. v. The Fashion Shop, Inc., 10 F. (2d) 909;
Davis v. John L. Roper Lumber Co. (supra);
C. & O. Ry. Co. v. Thompson Mfg. Co. (supra).

III

Burden of showing compliance with bill of lading requirement as to making of claim in writing rested upon plaintiffs.

The bill of lading clause involved herein, which is found under the heading "Contract Terms and Conditions," after setting forth "claims * * * must be made in writing * * * within six months after delivery * * * or in case of failure to make delivery within six months * * * after a reasonable time for delivery has elapsed;" further provides that if the loss, damage or injury was due to certain excepted causes not pertinent here, "no notice of claim nor filing of claim shall be required as a condition precedent to recovery." This language necessarily means that as to all other claims, the filing of claim in writing within the time specified is a condition precedent to recovery. We do not see how this can be open to argument. The wording of the clause is in full compliance with Paragraph 11, Section 20, of the Interstate Commerce Act, as already pointed out.

As to the effect of a condition precedent, it is of course well settled, as was said in Morotock Ins. Co. v. Fostoria Novelty Co., 94 Va. 361 at page 365, that:

> "A condition precedent calls for the performance of some act, or the happening of some event after the terms of the contract have been agreed upon, before the contract shall take effect."

Hence in the instant case, it was incumbent upon the plaintiffs, before being entitled to recover, to present evidence which would at least establish prima facie that claim was filed within the period specified. But the plaintiffs made absolutely no effort to show what was a "reasonable [fol. 33] time for delivery." Whatever weight or credit may be given the testimony of the defendant's witnesses on the subject, this evidence certainly did not tend to show in any sense that claim was made in writing before six months and a reasonable time for delivery had elapsed. In view of this state of the record, the plaintiffs are therefore for an additional reason barred from recovery as a matter of law.

It is submitted that the same decisions, particularly those of the United States Supreme Court, which have been cited and quoted above, as showing that a bill of lading provision of the character involved herein cannot be waived or made the subject of estoppel, fully support the principle that the burden of showing compliance therewith rests upon the plaintiff seeking a recovery, and are controlling.

Georgia, F. & A. R. Co. v. Blish Milling Co. (supra);
Texas & Pacific A. Co. v. Leatherwood (supra).

In Barrett v. Van Pelt, 268 U. S. 85; 69 L. Ed. 857, which was an action for loss due to delay in delivery of a shipment, it was said:

> "We are required to decide whether the case is one where notice or filing of claim may be required as a condition precedent to recovery."

And in the case of C. & O. R. Co. v. Thompson Mfg. Co., 270 U. S. 416; 70 L. Ed. 416, it was said as to a bill of lading clause similar to that involved herein, which contained a provision excepting the same class of claims from the notice of claim requirement:

"If respondent does not bring the case within the terms of the final proviso, its failure to give the written notice of claim will bar it from recovery."

See also

Southern R. Co. v. Prescott, 240 U. S. 632; 60 L. Ed. 836;

Central Vermont R. Co. v. White, 238 U. S. 507; 59 L. Ed. 1433.

The case of Hubbard Grocery Co. v. Payne, 94 W. Va. 271; 118 S. E. 152, was an action of assumpsit against a carrier for loss of an interstate shipment. The defendant demurred to the declaration on the ground that notice of [fol. 34] claim in writing had not been given in conformance with a bill of lading provision. In sustaining the demurrer, the Court said:

"It is our opinion that plaintiff should allege and prove the making of claim in writing to the carrier as required by the bill of lading, in view of the purposes of the law: (a) To give the carrier unmistakable notice of loss and claim for damages, in order to facilitate prompt investigation, which may lead to the finding and delivery of the lost goods or adjustment of the loss, and (b) guarantee uniform enforcement of the stipulation against all shippers without opportunity to the carrier to discriminate in favor of some by waiver or otherwise; and further considering the express terms of the stipulation that, as condition precedent to recovery, claims must be made in writing within time specified.

We also think that the United States Supreme Court, by whose decision in the premises all other courts in this country are bound, has in effect at least passed upon this question in holding that:

'Where the bill of lading of an interstate shipment requires notice of claim for misdelivery, such notice must be given before action can be brought against the terminal carrier making the misdelivery complained of.' G. F. & A. Ry. Co. v. Blish Milling Co., supra.

If the enforcement of the law depended upon the action or 'conduct' of the carrier in waiving, or setting up as a defense, this stipulation, according to its desire in the particular case, then, in the language of Justice Hughes, 'the door to the very abuse at which the act is aimed' would be opened."

U. S. Metallic Packing Co. v. Amer. Ry. Express Co., 87 Pa. Sup. Ct. 119, was a suit based upon the loss of two parcels of goods in the course of transportation by a carrier in interstate commerce. The defendant having relied upon a bill of lading provision requiring claim to be made within four months, the Court said:

"We hold that the making of a claim in accordance with the terms of the shipping receipt was a condition precedent to plaintiff's right of recovery. Having failed so to file its claim or bring its case within one of the three classes covered by the proviso of the Cummings Amendment or the exception contained in the contract of shipment, its recovery is barred."

[fol. 35] Even before the decision in the Blish case the weight of authority among state court decisions was to the same effect.

Smith v. S. A. L. R. Co., 174 N. C. 111; 93 S. E. 469;
Kalina & Cizek v. Union Pacific R. Co., 69 Kan 172; 76 Pac. 438;
Louisville etc. R. Co. v. Wideman, 9 Ind. App. 190; 37 N. E. 554;
B. & O. S. W. R. Co. v. Ross, 105 Ill. App. 54.

Cases illustrating the principle that where a Federal liability is sought to be enforced, the duty of going forward with the evidence upon a particular issue is a Federal question, are Southern R. Co. v. Prescott, 240 U. S. 632; 60 L. Ed. 836, and Central Vermont R. Co. v. White, 238 U. S. 507; 59 L. Ed. 1433.

The first of these cases was a suit for loss by fire of an interstate shipment while held by a railroad company in the capacity of warehouseman. It was held that although a local rule of procedure in South Carolina, where the loss occurred and the suit was brought, required the warehouseman to show freedom from negligence, under the decisions of the Federal Courts, the burden of establishing negligence as a basis of recovery was upon the plaintiff, and that rule should have been applied.

In the latter case, which was a suit under the Federal Employers Liability Act, it was shown that in Vermont, where the accident occurred and suit was brought, in an action of negligence, proof of freedom from contributory negligence was a condition precedent to recovery. But it was held that the United States Courts had uniformly held as a matter of general law that the burden of showing contributory negligence was on the defendant, and this practice had been properly followed by the trial court.

In conclusion it is submitted that the circumstances of this case clearly illustrate a situation of the exact type intended to be covered by the bill of lading provision regarding notice of claim, as approved by Acts of Congress, and by the Interstate Commerce Commerce. Although the means of knowledge of the misdelivery at least were easily available to the plaintiffs and their warehousemen, none of them took the trouble to fully investigate the matter or bring such knowledge to the defendant. It is apparent from the record that had notice of claim been given with any de- [fol. 36] gree of promptness there would have been no damage whatever to the potatoes.

The plaintiffs, contrary to the duty resting upon them in this action, have failed to show that notice of claim was given within the very liberal period specified by the bill of lading, and the evidence affirmatively and without contradiction shows that this period had fully expired before either claim was made or any inquiry was presented to the defendant. The defendant could not waive the notice requirement if it wished to. There was no conduct on its part which justified any plea of estoppel by the plaintiffs, nor if there were such conduct, could it effect the result of the case. The enforcement of the provision is in full accord with the established policy of uniformity, equality and nondiscrimination among shippers, and between shippers and carriers.

Wherefore, for the foregoing and other errors apparent on the face of the record, your petitioner prays that a writ of error and supersedeas may be awarded your petitioner to the said judgment of the Law & Equity Court, Part II, of the City of Richmond, and that the proceedings may be reviewed and judgment reversed, and that final judgment be entered for the defendant by this Court.

Respectfully submitted.

The Chesapeake and Ohio Railway Company, by
Leake & Spicer, Counsel.

We, the undersigned counsel, practicing in the Supreme Court of Appeals of Virginia, are respectfully of the opinion that the judgment complained of in the foregoing petition is erroneous, and that the same should be reviewed and reversed.

Meade T. Spicer, Jr., D. H. Leake.

Received Sept. 23, 1927. H. S. J.

Writ of error allowed and supersedeas awarded. Bond $2,000.00.

R. H. L. Chichester.

To the Clerk at Richmond.

Rec'd Octo. 17, '27. H. S. J.

[fol. 37] IN LAW AND EQUITY COURT OF CITY OF RICHMOND, PART II

H. E. MARTIN and W. H. PORTER, Plaintiffs,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation, Defendant

NOTICE OF MOTION FOR JUDGMENT—Filed Aug. 24, 1926

To the Chesapeake & Ohio Railway Company, a Corporation, Richmond, Va.:

Take notice that on Monday, September 13th, 1926, at ten o'clock A. M., or as soon thereafter as counsel can be heard, we shall move the Law and Equity Court of the City of Richmond, Part II, at the Court Room thereof in said City, for a judgment against you, The Chesapeake & Ohio Railway Company, a corporation, for the principal sum of $1,755.00, with interest thereon from November 16th, 1925, until paid, the said sum of money, with interest as aforesaid, being due us from you as shown by the account filed with this notice duly verified by affidavit filed therewith. This claim has been reported for taxation and assessed for each and every tax year on the first day of which we were the owners of same.

[fol. 38] Given under our hands this 23rd day of August, 1926.

H. E. Martin and W. H. Porter, by Counsel. J. F. Hall, p. q.

Account

The Chesapeake & Ohio Railway Co., a Corporation, to
H. E. Martin and W. H. Porter, Debtor

November 16th, 1925, to price and value of 260 bags of potatoes in Car FGEX No. 41759 @ $6.75 per bag	$1,755.00
By salvage of said potatoes	70.61
	$1,684.39

Plaintiffs claim interest on said sum from November 16th, 1925.

Duly sworn to by H. E. Martin. Jurat omitted in printing.

[fol. 39] And afterwards, to-wit, in the said Court on the 13th day of September, 1926.

This day came the Plaintiffs and the Defendant, by Counsel, and on the motion of the Plaintiffs, by Counsel, it is ordered that this case be docketed. The Defendant, by Counsel, then by leave of Court, filed herein its counter-affidavit and its plea of "non-assumpsit" and put itself upon the Country and the Plaintiffs likewise.

IN LAW & EQUITY COURT OF CITY OF RICHMOND, PART II

[Title omitted]

COUNTER AFFIDAVIT OF JOHN A. HANCOCK

STATE OF VIRGINIA,
City of Richmond, To-wit:

This day personally appeared before me, Jos. E. Powers, a Notary Public in and for the City and State aforesaid, in my said City, John A. Hancock, who made oath that he is Asst. Treasurer and Agent of The Chesapeake & Ohio Railway Company, defendant in the above styled cause; and that the plaintiff is not entitled as the affiant verily believes to recover anything from the defendant on such claim.

John A. Hancock.

Subscribed and sworn to before me this 13th day of [fol. 40] September, 1926. In testimony whereof I have hereunto set my hand the day, month and year aforesaid. My commission expires January 5, 1929. Jos. E. Powers, Notary Public.

IN LAW & EQUITY COURT OF CITY OF RICHMOND, PART II

[Title omitted]

PLEA OF NON-ASSUMPSIT

The said Defendant, by its Attorneys, comes and says that it did not undertake or promise in any manner and form as the plaintiffs hath in this action complained. And of this the said defendant puts itself upon the Country.

Leake & Spicer, p. d.

And afterwards, to-wit, in the said Court, on the 15th day of November, 1926.

This day came the Defendant, by counsel, and by leave of Court, filed herein its grounds of defense, and notice of its intention to rely upon the contributory negligence of the plaintiffs and the particulars thereof.

IN LAW & EQUITY COURT OF CITY OF RICHMOND, PART II

[Title omitted]

[fol. 41]

GROUNDS OF DEFENSE

1. Claim not made in writing to the originating or delivering carrier within the period required under the terms of the bill of lading.

2. Claim not made in writing to the originating or delivering carrier within the period required by law.

3. Claim not filed within the period allowed by law to be prescribed by carriers for the filing of such claims.

4. Notice of claim not given within the period allowed by law to be prescribed by carriers for the giving of such notice.

5. Plaintiff's damage, if any there were (which is denied) was not due to any delay or damage while being loaded or unloaded, or damage in transit by carelessness or negligence.

6. Plaintiff's damage, if any there were (which is denied), was due solely to misdelivery.

7. Defendant was not negligent.

8. Even if the defendant were negligent (which is denied), such negligence was not the proximate cause of any damage to the plaintiffs.

9. Plaintiffs have not been damaged.

10. Plaintiff's damage, if any there were (which is denied), was due to their own contributory negligence.

11. Plaintiff's damage, if any there were (which is denied), was due to causes not under the control of the defendant.

12. Delivery of shipment was made in accordance with disposition orders given to the defendant.

13. If delivery of shipment was not made in accordance with disposition orders given (which is denied) no proper disposition orders were given by the plaintiff.

14. Even if delivery of the shipment were not made in [fol. 42] accordance with the disposition orders given (which is denied) plaintiffs were not damages thereby.

15. Even if delivery of the shipment were not made in accordance with disposition orders given (which is denied) plaintiffs were aware of such fact in time to have avoided any damage.

16. Defendant denies that "H. E. Martin and W. H. Porter" have such interest in the shipment involved as would justify a recovery if there were any damage suffered (which is denied).

17. Defendant purchased no potatoes from H. E. Martin and W. H. Porter.

18. Defendant owes nothing to H. E. Martin and W. H. Porter, on account.

19. The value of the shipment, as set out in the plaintiffs' Notice of Motion, is excessive.

20. The defendant is not liable to the plaintiffs in any sum.

Leake & Spicer, p. d.

IN LAW & EQUITY COURT OF CITY OF RICHMOND, PART II

[Title omitted]

PLEA OF CONTRIBUTORY NEGLIGENCE

Notice of Intention to Rely upon the Contributory Negligence of the Plaintiffs and the Particulars Thereof

Without admitting, but, on the contrary, expressly denying that it was negligent, the defendant hereby gives notice of its intention to rely upon the contributory negligence of the plaintiffs in the following particulars, as a defense to this action:

[fol. 43] 1. In failing to dispose of the potatoes or take proper care for their protection and preservation after they knew or ought to have known where the potatoes were delivered.

2. In failing to promptly notify the defendant of a misdelivery, if such there were (which is denied).

3. In failing to make proper inquiries to ascertain where the potatoes were, in the event that the plaintiffs did not have this information (which is denied).

4. In such other particulars as will appear from the plaintiff's evidence.

Leake & Spicer, p. d.

IN LAW AND EQUITY COURT OF CITY OF RICHMOND

MINUTE ENTRIES OF TRIAL

And afterwards, to-wit in the said Court, on the 18th day of November, 1926.

This day came again the parties, by Counsel, and thereupon came a Jury, to-wit: F. W. Jones, E. W. Stearns, Edw. W. Dinwiddie, W. M. McChesney, Rufus H. Sarvay, R. D. Powell and C. M. Luck, who were sworn to well and truly try the issue joined and having partly heard the evidence were adjourned until to-morrow morning at eleven o'clock.

And afterwards, to-wit, in the said Court, on the 19th day of November, 1926.

This day came again the parties by Counsel, and the Jury appeared in Court pursuant to their adjournment, and having fully heard the evidence and arguments of Counsel, were sent out of Court to consult of a verdict and after sometime returned into Court and having not agreed upon a verdict, were adjourned until to-morrow morning at eleven o'clock.

And afterwards, to wit, in the said Court on the 20th day of November, 1926.

This day came again the parties by Counsel, and the Jury appeared in Court pursuant to their adjournment, and were again sent out of Court to consult of a verdict and after sometime returned into Court and declared they were unable to agree upon a verdict, and thereupon they were altogether discharged from further consideration of this [fol. 44] case. The Defendant, by Counsel, then moved the Court to enter up judgment for the Defendant notwithstanding the failure of the Jury to agreed upon a verdict, upon the ground that the record shows the plaintiffs have not complied with the Bill of Lading provision requiring claim for damages to be made in writing to the originating or delivering carrier or carriers issuing the Bill of Lading within six months after the delivery or the property, or, in case of failure to make delivery, within six months after reasonable time for delivery has elapsed, which motion the defendant filed in writing and is made a part of the record herein, and the Court having heard said motion, doth overrule the same, to which ruling of the Court, the defendant, by Counsel, excepted, and the further hearing of this case is continued.

In Law & Equity Court of City of Richmond, Part II

[Title omitted]

Motion for Judgment Notwithstanding Failure of Jury to Agree

The defendant, by its attorneys, moves the Court to enter up judgment for the defendant notwithstanding the failure of the jury to agree upon a verdict, upon the ground that the record shows the plaintiffs have not complied with the bill of lading provision requiring claim for damages to be made in writing to the originating or delivering carrier or carriers issuing the bill of lading within six months after the delivery of the property, or in case of failure to make delivery, within six months after reasonable time for delivery has elapsed.

In Law and Equity Court of City of Richmond

Verdict—April 1, 1927

This day came again the Plaintiffs and the Defendant, by Counsel, and thereupon came a Jury, to-wit: F. A. Seay, Chas. J. Shuman, Louis Ronick, John Kain, George E. Turner, T. S. Lloyd and Chas. Loeber, who were sworn to [fol. 45] well and truly try the issue joined, and the evidence being heard, the defendant filed a demurrer and the grounds thereof in writing, and the plaintiffs a joinder in said demurrer to the evidence; and the Jury being required to ascertain the plaintiff's damages, were sent out of Court to consult of a verdict and after some time returned into Court with a verdict in the words and figures following, to-wit: "We, the Jury on the issue joined, find for the plaintiffs and assess damages at $1,684.39, with interest from Nov. 16, 1925, subject to the opinion of the Court upon the Defendant's demurrer to the evidence."

Thereupon the defendant, moved the Court to set aside the verdict of the Jury, upon the grounds that the same is contrary to the law and the evidence and because the damages assessed are excessive, which motion is continued.

And it is further considered by the Court that this proceeding be continued for argument to be heard upon the Defendant's demurrer to the evidence.

IN LAW AND EQUITY COURT OF CITY OF RICHMOND, PART TWO

H. E. MARTIN and W. H. PORTER

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

Defendant's Demurrer to the Evidence

Be it remembered, that, after the jury was sworn to try the issues joined in this cause, the plaintiffs and defendant introduced the following evidence, which is all the evidence that was introduced, and which is made a part of this demurrer to evidence:

The plaintiffs, to prove and maintain the said issues on their part, introduced the following evidence:

W. H. PORTER, a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

[fol. 46] Examination in chief.

By Mr. Hall:

Q. Mr. Porter, you are one of the plaintiffs in this case, are you not?

A. Yes, sir.

Q. Please state your residence and occupation?

A. I live in James City County, Virginia; I am a farmer.

Q. Mr. Porter, were, or weren't, you and Mr. H. E. Martin partners in the fall of 1925 in the purchase and delivery of certain cars of potatoes, including car #F. G. Ex. 41759?

A. Yes, sir.

Q. Did you and Mr. Martin purchase the car of potatoes F. G. Ex. 47159, and, if so, from whom?

A. Yes, sir, from the Michigan Potato Growers Exchange.

Q. How many cars of potatoes did you and Mr. Martin purchase in the fall of 1925 from the Michigan Potato Growers Exchange?

Witness: Those for Richmond storage?

Mr. Hall: Yes, sir.

A. Twenty?

Q. Weee they all from the Michigan Potato Growers Exchange?

A. No, sir.

Q. Please state what arrangements you made, if any, for the receipt and storage of those potatoes in Richmond?

A. We arranged with Mr. Clarence Wyatt, who was proprietor of the Bowman Warehouse, to store twenty cars of potatoes for us. Mr. Wyatt said more than likely he would not be able to store those all in one house, but he would take care of and be responsible for the storage of twenty cars.

Q. Did you receive twenty cars of potatoes?

A. We had twenty cars billed to us; we received sixteen.

Q. What happened to the other four?

A. The other four showed too much frost; we could not store them when they were inspected.

Q. Were they rejected?

A. Yes, sir.

Q. Did you ever have any controversy with the shippers on that rejection?

A. No, sir.

Q. Now, Mr. Porter, did all of those potatoes arrive in Richmond over lines of the C. & O. Railway Co.?

[fol. 47] A. All except possibly the first car.

Q. Did you make any arrangement with the Chesapeake & Ohio Railway Company for the delivery of the entire bunch of cars?

A. The first car that came in we came to Richmond and——

Q. Who do you mean?

A. Mr. Martin and myself. We had to pay a switching charge on it, and the clerk at the C. & O. office told us, if we would give him the numbers of these cars before the cars arrived, hr would arrange in the future to have these cars delivered to the Bowman Warehouse without switching charge.

Q. In his opening statement, counsel for the defendant railway company stated that Mr. Martin gave them a list of eleven cars for delivery to the Bowman Warehouse. Were you present with Mr. Martin at that time?

A. I couldn't say for sure.

Q. Mr. Porter, were any instructions given to the Chesapeake & Ohio Railway Company by you and Mr. Martin for the delivery of the particular car involved in this case, F. G. Ex. 41759?

A. No, sir.

Q. Were any verbal instructions given?

A. I was present when we told the delivery clerk at the C. & O. how many cars of potatoes we expected to have and what we were going to do with all of them; they were all going to the Bowman Warehouse, and we never told him any further while I was present at any time except we gave him the numbers of all cars of potatoes that had been shipped up to that date that we had the numbers of. As soon as a car of potatoes was shipped in Michigan, they would give us the number, and we gave him at that time the numbers of all the cars that we had.

Q. Mr. Porter, I hand you what purports to be a sight draft from the Michigan Potato Growers Exchange and ask you whether or not that draft was paid by you and Mr. Martin?

A. Yes, sir.

Note.—Letter identified by witness, read and filed, marked "Ex. Porter #1."

Q. Was that draft for the purchase price, less freight, of this particular car in controversy?

A. Yes, sir.

Q. I hand you what purports to be the original freight [fol. 48] bill for car F. G. Ex. 41759, marked paid, November 16th, 1925, and ask you whether or not you and Mr. Porter paid that freight bill to the Railway Company?

A. Yes, sir.

Note.—Paper identified by witness was filed and marked "Ex. Porter #2."

Q. What is the amount you paid on this draft?

A. $1,546.35.

Q. What is the amount of the freight?

A. $208.00.

Q. Is it not $208.65?

A. Yes, sir.

Q. What is the total amount of that draft plus the freight?

A. $1,755.00.

Q. I ask you to refer to the original freight bill issued by the Railway Company and state what day that car of potatoes was shipped from Michigan?

A. It was shipped on November 6th.

Q. I hand you what purports to be a bill of the Chesapeake & Ohio Railway Company for demurrage of two days, amounting to $4.00, on car F. G. Ex. 41759, receipted for on November 16th, 1925, and ask you whether or not you and Mr. Martin on that day paid the two days' demurrage?

A. Yes, sir.

Note.—Paper identified by witness filed and marked "Ex. Porter #3."

Q. Now, Mr. Porter, will you please state what happened when you received notice of the arrival of this car?

A. We bought these potatoes subject to inspection on this end, and we have a potato inspector here in Richmond who inspects for all of Cary street. When the C. & O. notified us that this car had arrived, we notified the potato inspector to inspect this car of potatoes for us, and, as soon as we got the inspection report on these potatoes, we came up and took the draft up and paid the freight to have the potatoes unloaded. That about covers what you ask, I think.

Q. Were there any other cars consigned to you and Mr. Martin on the C. & O. yards at that time?

A. At that particular time there were five cars in one ship-[fol. 49] ment, all from one exchange. This was a five-car shipment.

Q. What happened to the other four?

A. The other four cars showed to be frosty, and it was only one car that would pass inspection.

Q. The other four were rejected?

A. The other four were refused.

Q. About what time of day on November 16th, 1925, did you all pay that freight and take up the draft?

A. Around 10 o'clock.

Q. In the morning?

A. Yes, sir.

Q. Where did you pay the freight?

A. Paid the freight at the C. & O. office.

Q. What office?

A. Ninth Street.

Q. Did you direct the C. & O. at that time, or at any time, to deliver this car of potatoes to D. S. Harwood?

A. No, sir.

Q. Did you know Mr. Harwood; had you ever had any business with him?

A. No.

Q. Had you ever heard of him?

A. No, sir.

Q. Was the name of Mr. Harwood mentioned by you or Mr. Martin in your presence with the railway agents?

A. No, sir. I didn't know Mr. Harwood at all.

Q. *No, sir. I didn't know Mr. Harwood at all.* for the purchase of twenty cars of potatoes during the season for delivery in Richmond and actually took up sixteen cars. What happened to the other fifteen cars?

A. The *ofter* fifteen cars were delivered at the Bowman Warehouse, or delivered where he told them to deliver them—majority of them at his warehouse.

Q. When was the first time that you knew that this particular car had not been delivered to the Bowman Warehouse?

A. I think it was the 26th day of December. It was about thirty days after we paid the freight on the car that we got a letter from Mr. Wyatt asking us to return his warehouse receipt on this particular car; he didn't have it.

Q. Had Mr. Wyatt issued a warehouse receipt for this car?

A. Yes, sir.

Q. I hand you what purports to be a letter of December 22nd from the Bowman Storage Company and ask you if that is a letter that you received from Mr. Wyatt?

[fol. 50] A. Yes, sir.

Note.—Letter identified by witness, read and filed, marked "Ex. Porter #4".

Q. Now, Mr. Porter, what did you do when you received that letter?

A. We received that letter and came to Richmond and went to Mr. Wyatt's place; Mr. Wyatt was not in. We telephoned around to his house, and his wife didn't know where he was. We hung around for an hour possibly, couldn't find Mr. Wyatt. We went around to the warehouse. His warehouse manager is a colored man, way above the average intelligence of an ordinary colored man; he has complete charge of the warehouse.

Mr. Spicer: We object. I don't think he is competent to pass on the mentality of the employee.

The Court: At this stage of the case we are dealing with the degree of care Mr. Porter exercised. This evidence I think is admissible.

Mr. Spicer: We except.

A. (continued). We were in the warehouse every other day or every third day for the whole year almost and we saw this man daily. He had complete charge of this warehouse and he kept his receiving book and delivery book, and he shipped all the stuff out; he counted it, he hired men and he was responsible and Mr. Wyatt teusted him. We asked this man about this car of potatoes. He said "Mr. Wyatt says he hasn't got this car of potatoes". He says "We have got the car of potatoes, Mr. Porter. We have got fourteen cars of your potatoes in this warehouse and we have got two of them stored in the next warehouse". He said "Mr. Wyatt is celebrating". He carried us downstairs and showed us fourteen cars of potatoes in his warehouse, and he carried us next door and showed us two cars in the next warehouse that were tagged with our cards on them, Martin and Porter, 260 sacks of potatoes, car number so and so. We didn't stop at that. We came up the next day and the day after that and saw Mr. Wyatt. We told him we had his letter. He said "How many cars of potatoes have you got"? We told him we had sixteen cars around there and that Jesse had showed us the book.

[fol. 51] By Mr. Hall:

Q. Who is Jesse?

A. He is the colored warehouse manager. He had showed us the book where he had received this car of potatoes, and had shown us where he had fourteen cars downstairs and two cars next door. "Well," he said, "I have seen Mr. Harwood since I talked to you, and he says he didn't have the car of potatoes. He says he hasn't a license to store potatoes, but," he says, "I saw him sometime ago and he told me he did have the car of potatoes." Mr. Wyatt was celebrating. It was during the Christmas holidays.

Mr. Spicer: We object. I don't think that is proper.

The Court: It is relevant to this extent: If he wasn't capable of attending to the warehouse, whoever was in charge was the proper person for Mr. Porter to deal with. The whole purpose of this testimony is to show whether Mr. Porter acted with proper care in ascertaining after he got that notice from Mr. Wyatt.

A. (continued). Mr. Wyatt got in his car and we went back to the warehouse, and Mr. Wyatt's manager told him that he had the car of potatoes. There was never any argument about it at that time. We accepted storage of the car of potatoes; we paid storage as the check will show on full sixteen cars of potatoes. It was never any argument about it at that time. We were absolutely sure we had the potatoes, and we checked this car of potatoes. He stored a car of onions on top and there were a good many decayed potatoes, and we hadn't finished checking the potatoes when we found this car of potatoes.

Q. You spoke of this manager of this warehouse, this man Jesse. Is Mr. Wyatt's office in that warehouse?

A. No, sir. Mr. Wyatt's office is in South Richmond.

Q. I ask you to refer to this letter-head of the Bowman Company, where it says at the top, among other things, office and warehouse 1013-1017 Canal street," and ask you whether or not that is the warehouse at which those potatoes were stored?

A. The warehouse was Virginia street, or Virginia Avenue.

Q. A different warehouse from the one shown on that letter?

A. Yes, sir.

Q. Was any one at that warehouse superior in authority to Jesse?

[fol. 52] A. No, sir.

Q. Where was this record book that you refer to, which showed on storage in that warehouse under the Bowman Company of this particular car?

A. The record book was made around at the warehouse. Jesse kept the book.

Q. It was under Jesse's charge, was it?

A. Yes, sir, it was made there.

Q. Please state whether or not on this particular car there were posted any notices or signs indicating that this particular car was in storage by the Bowman Company?

A. No, sir. He showed us this particular car. It didn't have the car number on it.

Q. How many cars did he show you?

A. Sixteen cars.

Q. Now, Mr. Porter, what arrangement as to payment for storage on these cars of potatoes did you have with the Bowman Company?

A. I don't know that we had any arrangement, but we paid them for it monthly, I think, all the time, right through.

Q. Did you pay him for sixteen cars?

A. Yes, sir.

Q. Did he accept that payment?

A. Yes, sir.

Q. Did he ever say anything to you about paying anybody else for storage on any of these cars?

A. Yes, sir.

Q. Please state what he did say?

A. When we made our first payment he told us to make a check to Mr. Harwood for some of those potatoes, how many I don't remember at this time. We told Mr. Wyatt the potatoes were stored under his supervision; he would have to attend to it; we were going to pay him.

Q. Did you pay him?

A. Yes, sir, we paid him.

Q. Mr. Porter, what was the first information that you had thereafter that these potatoes were not at the Bowman Company?

A. We got a letter from Mr. Harwood saying he had a car of potatoes that possibly belonged to us.

Q. I hand you what purports to be a letter from D. S. Harwood, under date of May 10th, 1926, and ask you if this is the letter.

A. Yes, sir.

[fol. 53] Note.—Letter indentified by witness, dead and filed, marked "Ex. Porter #5."

Q. What did you do upon receipt of that letter?

A. We came to Richmond and saw Mr. Harwood and looked at the potatoes, saw Mr. Harwood that day I think; if we didn't see him that day, we did the next day. One trip we were here he wasn't in.

Q. Now, Mr. Porter, do you recall how you got that letter?

A. No, sir, I don't recall how we got this letter. I think Mr. Martin received this letter.

Q. When you first saw that letter did it have that memorandum on it which is at the bottom of the letter?

A. I don't remember whether it did or not. I don't remember that.

Q. I now hand you what purports to be a letter of May 19th, 1926, from D. S. Harwood to H. E. Martin, and ask you whether or not that letter came to Mr. Martin in reference to this car of potatoes? Is that the letter?

A. Yes, sir.

Note.—Letter identified by witness was read and filed, marked "Ex. Porter #6."

Q. Now, Mr. Porter, what did you do upon receipt of that letter?

A. I don't know. We inspected the potatoes. We found they were practically worthless. I didn't think they would bring storage charges.

Q. What was the matter with the potatoes then?

A. The potatoes had been stored on the top floor, and possibly some had frozen, and right up under a tin roof. They got warm and had sprouted and come all through the top of the bags, sprouts twelve inches long. They were hot. Looked like they were absolutely worthless.

Q. Did you file, or cause to be filed, with the Railway Company notice of this claim?

A. Yes, sir.

Q. I ask you whether or not this notice, with the copy of letter thereto attached, was written by your counsel to the Railway Company under you authority?

A. Yes, sir.

Note.—Papers identified by witness were read and filed marked "Ex. Porter #7" and "Ex. Porter #8."

[fol. 54] Q. Now, Mr. Porter, when you received this letter from Mr. Harwood, did you call on the Railroad Company?

A. Yes, sir.

Q. Did you see the freight agent or some one in the office?

A. Yes, sir.

Q. Whom did you see?

A. Saw the Treasurer, I think.

Q. Do you know his name?

A. No, sir. Mr. Neiss pointed him out to us.

Q. Did he make any statement in reference to the delivery of this car in controversy?

A. He said we had given him orders to deliver this car to Harwood.

Q. Had you given any such order?

A. No, sir.

Q. Had you ever given any order of any kind to the Treasurer?

A. No, sir.

Q. Did you have any conversation with Mr. Neiss?

A. Yes, sir.

Q. Did he make any statement about an order which had been given to deliver this car?

A. Mr. Neiss understood the car was to go to the Bowman Warehouse; that all of them were; that he had Mr. Harwood's signature for this car of potatoes, but he had seen Mr. Harwood the night before and Mr. Harwood said it was not his signature.

Q. Do you know whether that is Mr. Harwood's signature?

A. No, sir. He said Mr. Harwood refused to write his name; he asked him to write his name on a piece of paper and he refused to do it.

Q. I hand you what purport to be two letters from the Chesapeake & Ohio Railway Company, one dated May 28th, 1926, and one under date of June 7th, 1926, directed to your counsel, and ask you whether or not those two letters were in reply to the letter of May 25th, which you have just read?

A. Yes, sir.

Note.—Letters identified by witness were read and filed, marked "Ex. Martin #2" and "Ex. Martin #3."

Q. Mr. Porter, I ask you if you will read and file as "Ex. Porter A." a letter under date of July 15th, 1926, from J. W. King, Freight Claim Agent, to your counsel?

[fol. 55] A. Yes, sir.

Note.—Letter read and filed, marked "Ex. Porter A."

Q. Now, Mr. Porter, had Mr. Martin, in your presence or with your knowledge, given any such order as referred to in these letters for the delivery of this car to D. S. Harwood?

A. No, sir.

Q. Had your attention ever been called to the delivery of this car to D. S. Harwood at any time prior to May, 1926, except the incident about Christmas, 1925, about which you have testified?

A. No, sir.

Q. How many trips, if you recall, did you make to Richmond in following up Mr. Wyatt's letter of December 22nd?

A. We made two trips for that specific purpose to straighten out this car, and we were in Richmond every week twice a week, sometimes three times a week.

Q. Did Mr. Wyatt ever mention to you again after that letter of December 22nd that this car was not in his possession?

A. No, sir.

Q. Did he appear satisfied that it was in his possession on your second trip as you testified when he went with you to the warehouse?

A. Yes, sir.

Q. Please state whether or not, after you received this letter of December 22nd, you ever saw Mr. Wyatt, in reference to this car and gave him the information that Jesse, his man in charge of this warehouse, showed you the car?

A. On our second trip when we found Mr. Wyatt we came right down to the warehouse, and I think Mr. Wyatt was just as much convinced as we were that he had the car of potatoes.

Q. You went to the warehouse?

A. Went to his warehouse where the potatoes were stored.

Q. Did you see Jesse that trip?

A. Yes, sir, he was there all the time.

Q. Did Jesse repeat in substance his previous statement that the car was there?

A. We just went down to the warehouse and counted the potatoes up.

Q. How many cars did you count?

A. Sixteen cars, just the same as they were before. These potatoes were stored up so many high right up to the ceil- [fol. 56] ing, ceiling about as high as your head; no trouble to count them. Every car had 260 sacks, came out even all the time; no trouble in the world getting count of them. You could tell very easily how many cars you had.

Q. In his opening statement, counsel for the Railway Company has stated that you and Mr. Martin did not use reasonable care to locate these potatoes after you received that letter of Mr. Wyatt's.

A. Mr. Hall, we could have gotten at this time two dollars a sack premium on those potatoes. We were just as anxious to get them as possibly could. Potatoes had been going up the whole year. Potatoes went up to ten dollars and above a sack, and we wouldn't want them on our hands until we couldn't get any more than we paid for them. We were absolutely sure we had these potatoes. If we had had any doubt in the world we would have located them.

Q. You and Mr. Martin were satisfied that you had the potatoes, were you not?

A. Yes, sir, we were satisfied; we were thoroughly convinced that we had them.

Q. You are accustomed to handling potatoes, are you not?

A. Yes, sir, been handling potatoes twenty years.

Cross-examination.

By Mr. Spicer:

Q. Mr. Porter, you said this car arrived November 12th at Fulton Yards of the C. & O., I believe?

A. Yes, sir.

Mr. Hall: Excuse me just a minute. I don't want to bring it out in re-direct. Mr. Porter, is this memorandum here in your handwriting (indicating)?

Witness: Yes, sir.

Mr. Hall: Please state what that is.

Witness: Well, I don't know what that is.

By Mr. Spicer:

Q. Was the car inspected by Mr. Lee?

A. Yes, sir.

Q. Were you present when it was inspected?

A. Yes, sir.

Q. That was on November 12th?

A. I think that was on Saturday.

[fol. 57] Q. Do you remember receiving an inspection report by Mr. Lee on this car?

A. No, I don't think this car was inspected until Monday. We had turned these other four cars down and this was the fifth car that came in later. Four cars came in at one time out of this five car shipment, and the fifth car came in a few days later.

Q. You refer to Monday. Monday was the 16th as I understand?

A. Yes, sir.

Mr. Hall: There is no dispute about that.

By Mr. Spicer:

Q. The 16th of November was Monday?

A. Yes, sir.

Q. I hand you herewith what purports to be an inspection report by Mr. Bert Lee on car F. G. Ex. 41759 and ask you, after looking at that, to state now what day that car was inspected?

A. The inspection sheet is November 12th.

Q. You were present that day?

A. No, sir.

Q. You were present when it was inspected?

A. I was present when it was inspected.

Q. If it was inspected on the 12th, you were present?

A. Rather, I inspected the car of potatoes with Mr. Lee. He was there at one time when I looked at it. I don't know whether I was present at this inspection or not. We told Mr. Lee to inspect all cars consigned to us and he went right ahead and inspected as soon as they came in.

Q. His report shows——

A. His report shows the car was inspected November 12th. You get these inspection reports as many as ten days between before he would make them out. I had to insist on his making it out before he would

Q. You got a pretty general idea of the condition of the car when you saw it?

A. Yes, sir.

Q. Mr. Lee's report, if I may refresh your memory, was that the car was in good condition with the exception of a certain amount of decay.

A. Certain amount of decay in it, but not enough to be refused.

[fol. 58] Q. He stated that in this report, that it meets the requirement of grade with the exception of decay?

A. Yes, sir.

Q. In the dealings of Martin and Porter with the Ninth street freight office with whom were those dealings conducted?

A. Majority with Mr. Neiss.

Q. The gentleman right here?

A. Yes, sir.

Q. Did you conduct the negotiations on behalf of Messrs. Martin and Porter?

A. Mr. Martin did.

Q. Mr. Martin did the talking?

A. Yes, sir, practically all of it.

Q. Any disposition orders that were given on cars were given by Mr. Martin?

A. Yes, sir.

Q. Mr. Martin paid the freight on this particular car involved in this suit?

A. Martin paid freight on all cars if I am not mistaken. He handled all the money on the deal. I don't think anybody else did. He paid all that was paid.

Q. When you received Mr. Wyatt's letter of December 22nd, how many of these cars of potatoes had you disposed of?

A. None.

Q. Will you state in what length of time they were disposed of and in what kind of lots?

A. Started about April.

Q. How many had you disposed of at the time that you received Mr. Harwood's letter of May 10th?

A. We only had a part of a car left, not over a car at the outside.

Q. Not over a car?

A. No, sir.

Q. Did you ever get a negotiable warehouse receipt for this car?

A. Yes, sir.

Q. Are you positive of that?

A. Yes, sir.

Q. Do you remember how many warehouse receipts you were given by Mr. Wyatt during that time?

A. No, sir, I do not.

Q. Wasn't the receipt that he referred to in his letter of December 22nd purely a memorandum receipt?

A. I guess any receipt would be a memorandum receipt that would come from a warehouse; you would call it a [fol. 59] memorandum receipt, but it was a receipt for a car of potatoes stored there. We told Mr. Wyatt that possibly we would want to borrow some money on these potatoes and wanted a negotiable receipt covering the entire shipment; we didn't know how long we were going to hold them, we might buy some more and might need money. All right, he gave it to us:

Q. Did you borrow any money on those potatoes?

A. No, sir. Potatoes went up so rapidly we didn't buy any more.

Q. Wasn't the form of receipt given to you for the car involved in this case like that form (indicating)?

A. I don't know, sir; I couldn't tell you; I don't know that I ever saw that form of receipt.

Q. You don't know whether it was a negotiable receipt or not?

A. I saw the negotiable receipt, yes, sir.

Q. Is that a negotiable receipt?

A. I don't know whether that is or not. It wasn't this form.

Q. I mean as to this particular car. Would you say that is a negotiable receipt?

A. I don't know whether I would or not. This was a negotiable receipt we got. I carried it to the bank and made arrangements to borrow money on it if we wanted it. That is the reason I know it was a negotiable receipt. I asked for a negotiable receipt and he said he gave it. I don't know that I ever read the receipt.

Q. Do you know whether that receipt was given before this car came in?

A. It was given for 14 cars stored in the warehouse.

Q. You don't know whether it included this car or not?

A. No, sir, I don't know.

Q. Presuming these potatoes were stored in the proper way, would they be in the same condition on, say, January 1st, as they would have been when delivered the latter part of November?

A. I don't understand you.

Q. Would there be any material deterioration in the potatoes between the latter part of November and first part of January?

A. No, sir.

Q. If properly stored?

A. No, sir.

Q. When you came to Richmond in answer to Mr. Wyatt's letter of December 22nd, did you make any inquiry at the [fol. 60] Chesapeake & Ohio Railway Company or at D. S. Harwood's warehouse?

A. No, sir.

Q. You didn't come up to the freight station of the C. & O.?

A. No, sir.

Q. You said you came back to Richmond once or twice or three times a week during the potato season and subsequent to December 22nd?

A. Yes, sir.

Q. Did you have occasion to go over to the warehouse frequently?

A. Yes, sir.

Q. In what size lots did you dispose of the potatoes that were stored at the Bowman Warehouse?

A. We sold a few potatoes around Richmond, but we sold the bulk of them in one shipment.

Q. At one shipment?

A. The bulk of them.

Q. About how many?

A. I expect ten cars.

Q. You had 16 cars stored there. If you had 16 cars stored there what would be the normal amount of shrinkage between the time that you received them and the time that they were sold?

A. Somewhere between five and six per cent.

Q. If an extra car was missing, as subsequently developed in this case, what would be the shrinkage then; what was the shrinkage?

A. That should amount to a great deal more.

Q. What would be the percen*ateg* of shrinkage in that on the basis of 16 cars?

A. I don't know.

Q. It would certainly increase one-sixteenth?

A. Yes, sir. We were shipping potatoes from other warehouses at the same time we were shipping from here. Those potatoes went to the government. We were filling a twenty-some car contract.

Q. Do you remember when this bulk shipment went out?

A. Yes, sir.

Q. What time?

A. About April.

Q. You still figured from your books that you had sixteen cars in the Bowman Warehouse?

A. We were so convinced of it we didn't even keep ac-[fol. 61] count of it at all, had never checked them up. We hadn't finished. We had more potatoes at Toano that we hadn't disposed of and they were all bought at the same time and bought with the same money and in the same pool. We never had checked up on them. The potatoes that we had in Richmond were counted with the potatoes that we had there. It would have been thirty days more before we found out that we had this much shortage.

Q. When Mr. Harwood wrote you, you didn't know the car was missing?

A. No, sir, I didn't know it.

Q. You wouldn't have known it probably at all?

A. Oh, yes, sir; we don't do business that way. We are farmers; what we get we get by hard knocks.

Q. Why would you be so much more likely to discover the error after May 1st and not prior to?

A. We wouldn't have discovered it until we made a final check on our potatoes.

Q. When would that have been?

A. Probably thirty days after this time, before we would have finished disposing of them.

Q. At the time Mr. Harwood's letter was received in May, you didn't have quite a carload of potatoes?

A. I don't think we had quite a carload in Richmond, but we did have them in Toano.

Q. I believe you said there was no way in which you could specify this particular car of potatoes in the Bowman Warehouse; in other words, there was nothing on the bags of potatoes as they were stored there to indicate that they came from car F. G. Ex. 41579?

A. No, sir. Some potatoes were in brand new bags and others were in second-hand bags.

Q. You did receive a memorandum warehouse receipt in the latter part of November covering this particular car?

A. Yes, sir, we received it.

By Mr. Hall:

Q. Did Mr. Wyatt ever ask you again by letter or in any of the personal conversations you had with him to return to him the receipt for this car?

A. It never was mentioned.

By Mr. Spicer:

Q. So far as you know is that letter, written May 25th, addressed to the Chesapeake & Ohio Railway Company, the [fol. 62] first written notice of claim filed with the C. & O. Railway Company, or any other railway company involved in this case?

A. That was the first notice, yes, sir.

Q. Does the letter show when it was received by the C. & O. Railway Company? Is there anything on the letter, itself? Does this letter have anything on it to indicate when it was received by the C. & O. Railway?

A. Yes, sir, it is stamped.

Q. What is the date?

A. Received at C. & O. 9th street station May 26th, 1926, Richmond, Va.

Q. At the same time that letter was written, a letter was written to Mr. D. S. Harwood, calling his attention to the claim, and the suggestion was made that he and the railway company get together on the matter and take care of the claim which you gentlemen had?

Mr. Hall: We object to that. The letter speaks for itself.

The Court: Both letters are introduced.

Mr. Spicer: I just ask him as a matter of fact, wasn't a letter sent to D. S. Harwood at the same time?

The Court: It is in evidence that it was. Your question went further. I understood the objection was to the rest of it.

By Mr. Spicer:

Q. At the same time claim was brought to the attention of the C. & O., you brought it to the attention of D. S. Harwood?

A. At the same time, yes, sir.

Witness stood aside.

[fols. 63 & 64] EXHIBIT "PORTER #1"

#1025. Original. Collection #2572

Michigan Potato Growers Exchange, Edmore, Michigan

Nov. 5th 1925. 192-.

On arrival, at sight, with exchange, pay to the order of Edmore State Bank one thousand five hundred forty six & 35/100 dollars $1,564.35.

Commodity: 260 bags potatoes.

Michigan Potato Growers Exchange. D. Wagner, General Manager. L. J. M.

Car FGEX No. 41759.

To H. E. Martin, Lanexa, Va., thru State & City Bank, Richmond, Va.

Shipped to same at Richmond, Va.

Route: PM HV C&O.

260 bags potatoes @ 6.75 per bag	1,755.00
Freight allowed	208.65
Draft	1,546.35

All claims must be reported immediately and full particulars mailed within five days accompanied by Paid Express Bills with proper notation of Freight Agent or no claim will be allowed.

No protest.

Federal Reserve Bank. Paid Nov. 16, 19, 1925. Collection Department, Richmond, Virginia.

(Here follow Exhibits "Porter No. 2" and "Porter No. 3," side folios 65 & 66 and 67 & 68)

C. & O. Ry. Co. v. H. E. Martin and W. H. Porter.

Form A. F. 313
Revised 4-1925 **2**

(125) THE CHESAPEAKE AND OHIO RAILWAY CO.
EXHIBIT "PORTER #2"
FREIGHT BILL—ORIGINAL
For Charges on Articles Transported

Make Checks Payable to The Chesapeake and Ohio Railway Co.

Date 11/12/25
Pro. No. 5584

Stop this Car at For

Tonnage for Engine Rating: Gross Tons Net Tons

Date 11/6/25 Waybill No. 60

From—Number Edmore, Mich. (Station) Wyman Mich. P. M. (State)

Car Initials and Number FGEX 41759

Transferred to
At

Full Name of Shipper, Origin and Date, Original Car, Transfer Freight Bill and Previous Waybill Reference When Rebilled

Mich Potato Growers EDC

To— 0125 (Station) RICHMOND (State) VA.

Length of Car		Marked Capacity of Car		Stencilled Wgt. of Car
Ordered	Furnished	Ordered	Furnished	

Route (Show each Junction and Carrier in Route Order to destination of waybill. Indicate by check mark whether Shipper's or Agent's routing.)

TOL H V COL C&O

Shipper's Routing
Agent's Routing

Consignee, Address (Final Destination and Additional Routing)

Mich Potato Growers Exc
Advise H. E. Martin

Instructions Regarding Icing, Ventilation, Milling, Weighing, Etc. If Iced, Specify to Whom Icing Should be Charged

Indicate by symbol in column provided * How weights were obtained R—Railroad Scale. A—Weighing Bureau or Agreement. T—Tariff, Classification or Minimum. S—Shipper's Agreement or Tested Weight. E—Estimated (weigh and correct.)

Weighed at..

Gross Tare Allowance Net

1st Transfer	2nd Transfer	3rd Transfer	4th Transfer	5th Transfer

Description of Articles and Marks	Commodity No.	Weight	*	Rate	Freight	Advances	Prepaid
260 Sks Potatoes Fulton EP (allow inspt) C & O Ry. Co Received Payment Nov. 16, 1925 G. A. Warren, Agt. Per J. J. W. Cashier		39000		53½	20865		

Received payment for the Company, ...192

....Freight Agent

Total to Collect

Claims for errors, loss or damage should be presented promptly to Freight Agent

EX. PORTER #3
THE CHESAPEAKE AND OHIO RAILWAY COMPANY

Form D. 191

Bill for Car Demurrage
M H. E. Martin

No.

9th Station
Nov. 16 19

For Car Demurrage Charges as per following Itemized Statement:

Car		Contents	No. 1 Arrived		No. 2 Notice Given		No. 3 Ordered		No. 4 Constructively Placed		No. 5 Actually Placed		No. 6 Released		Amount
Initial	Number		Date	Hour	Date	Hour	Date	Hour	Date	Hour	Date	Hour	Date	Hour	
FGEX	41 759	Pots.	11/12		11/12		R/c		Sou		11/16	2			4 00

C. & O. Ry Co
Received payment
No. 16, 1925
G. A. Warthen, Agt.
Per J. L. W., Cashier
Received Payment for the Railroad

19

Draw Check to Order of Chesapeake and Ohio Railway Co.

Agent

[fol. 69] EXHIBIT PORTER #4

Clarence Wyatt. Clarence Wyatt, Jr.

The Bowman Transfer and Storage Warehouse Co.

General Storage Warehouse for All Railroads and Steamship Lines Terminating in Richmond

Distributing and Forwarding Agents

Office and Warehouse: 1013-15-17 Canal Street
Phones: Madison 6978, 30, 579

Richmond, Va., Dec. 22, 1925.

H. E. Martin & Co., Lanexa, Va.

GENTLEMEN: Thru error we mailed you under date of Nov. 24th, our warehouse Memorandum receipt for 260 bags Potatoes from Car FGE. 41759.

This car was not stored in our warehouse but was placed in the warehouse of D. S. Harwood, and we ask that you return us this receipt, which you will find is numbered N. G. 6494.

Wishing you a very merry Christmas, and with the personal regards of the writer, we are,

Yours very truly, The Bowman Transfer & Storage Warehouse Co. Clarence Wyatt, Jr.

CWJr. PDC.

[fol. 70] EXHIBIT PORTER #5

D. S. Harwood, Manufacturer's Agent

Office and Warehouse: 1426 and 1428 East Cary Street

Richmond, Va., May 10, 1926.

H. E. Martin, Toana, Va.

DEAR SIR: Last fall I stored a number of cars potatoes, a greater portion of which for Mr. John A. Ahern. I also stored a few for other parties. These potatoes have been drawn from my warehouse from time to time, Ahern's stock being the last of the lot. In delivering him I noticed he had not been hauling any potatoes from a certain No. 41759, which I unloaded on November 24th.

I called his attention to this and we both looked into the matter and as I understand it the American Potatoe Co. had several cars of potatoes on C. & O. tracks which I was ordered to store. The cars were placed at my warehouse and assuming they were Mr. Ahern's potatoes the car was taken in and has been cared for every since.

As I understand it this car of potatoes belongs to you and since they have been in my warehouse considerable time I would be very glad to make disposition of them. I am prompted to believe that this matter has been overlooked by you since I understand you surrendered the B/L for the car.

Please let me hear from you with reference to same, as Mr. Ahern makes no claim and if they do not belong to you I do not know who they do belong to.

Yours very truly, D. S. Harwood.

DSH:GES.

Mr. Herbert:

The C. & O. has at last reported that they sent this car to D. S. Harwood warehouse without any written order from you.

Clarence Wyatt, Jr.

[fol. 71] EXHIBIT PORTER #6

D. S. Harwood, Manufacturer's Agent

Office and Warehouse: 1426 and 1428 East Cary Street

Richmond, Va., May 19, 1926.

H. E. Martin, Toana, Va.

DEAR SIR: On May 10th I wrote you with reference to car potatoes which I had in store No. 41759. You called on me a few days after this, made some inquiry and stated you would let me hear from you later in the day or the next morning. I have not seen or heard from you since and it is very important that something should be done in this matter, and I would like to know what I must do for the protection of the goods as they are certainly not improving and should be handled at once.

Please let me hear from you without delay.

Yours very truly, D. S. Harwood.

DSH:GES.

Exhibit Porter #7

Law Offices of Hall, Hall & Peachy, 503-505 Travelers Building, Richmond, Va.

May 25, 1926.

Chesapeake & Ohio Railway Company, 9th and Main Streets, Richmond, Va.

Attention Mr. G. A. Warthen

Gentlemen: On behalf of H. E. Martin, Lanexa, Va., and [fol. 72] W. H. Porter, Toano, Va., we are writing you with reference to car of 260 sacks of potatoes, car "FGEX No. 41759, consigned to Michigan Potato Growers' Exchange, advise H. E. Martin, shipped in November, 1925.

This car was delivered by you without authority to D. S. Harwood, Richmond, Va., and Messrs. Martin and Porter have discovered it within the past few days. The potatoes are now in the warehouse of D. S. Harwood, at 1426 and 1428 East Cary Street, Richmond, Va. Messrs. Martin and Porter expect, of course, to be reimbursed for these potatoes. In the meantime, however, the potatoes have spoiled, and it is very doubtful whether or not any market for them is obtainable. We called at your freight office to-day with the suggestion that the potatoes be run so as to get as much salvage from them as possible, and that your freight and vegetable Inspector inspect them at the warehouse of D. S. Harwood as soon as possible.

We are writing this letter to give you notice of the claim, and if you have any formalities which should be complied with will you please let us know? In the meantime, it occurs to us that the best arrangements possible should be made for disposing of the potatoes. We do not know what respective differences may exist between your Company and Mr. Harwood as to liability, but it strikes us that arrangements should be made for the sale of the potatoes if a sale is possible, so as to prevent further damage to the potatoes.

We are enclosing copy of our letter of this date to Mr. D. S. Harwood. Will you please let us hear from you?

Yours very truly, Hall, Hall & Peachy.

JFH/A.

Received at C. & O. Ninth Street Station, Richmond, Va., May 26, 1926.

EXHIBIT PORTER #8

Law Offices of Hall, Hall & Peachy, 503-505 Travelers
[fol. 73] Building, Richmond, Va.

May 25, 1926.

Mr. D. S. Harwood, 1426-1428 E. Cary Street, Richmond, Va.

DEAR SIR: We are enclosing copy of our letter of this date to the Chesapeake and Ohio Railway Company, with reference to car F. G. Ex. No. 41759. Messrs. Martin and Porter, of course, expect to be reimbursed for these potatoes, and without regard to any differences that might develop between yourself and the Railroad Company as to ultimate liability, it strikes us that the sensible thing to do is to dispose of these potatoes, when they are run, to the best possible advantage if a sale can be made of them. This will minimize the loss as much as possible to the party ultimately liable for the potatoes to Messrs. Martin and Porter.

Yours very truly, Hall, Hall & Peachy.

Copy to Chesapeake and Ohio Rwy. Co., 9th and Main Streets, Richmond, Va.

JFH/A.

EXHIBIT MARTIN #2

The Chesapeake and Ohio Railway Company

Desk SNC. Richmond, Va., May 28th, 1926.

Messrs. Hall, Hall & Peachy, 503-505 Travelers Building,
Richmond, Virginia.

GENTLEMEN: Your letter of May 25th, File JFH-A, con- [fol. 74] cerning FGEX 41745, Potatoes consigned to the Michigan Potato Growers Exchange, advise H. E. Martin from Wyman, Mich., November 6th, 1925, is being referred to our Mr. J. W. King, Freight Claim Agent, Richmond, Va., today for attention.

Yours truly, G. A. Warthen, G. A.

EXHIBIT MARTIN #3

The Chesapeake and Ohio Railway Company

J. W. King, Freight Claim Agent

R/C #179. Richmond, Va., June 7th, 1926.

Mess. Hall, Hall & Peachy, Attorneys-at-Law, 503-505 Travelers Building, Richmond, Va.

GENTLEMEN: Your letter May 24th to Mr. G. A. Warthen, our General Agent, in regard FGEX car 41759, potatoes, consigned to Michigan Potato Growers Exchange, advise H. E. Martin, Richmond, shipped in November, 1925, was referred to this office.

Upon investigation, we find this car was delivered D. S. Harwood's warehouse for storage after H. E. Martin had paid the freight, and upon his order. It appears Mr. Martin must have overlooked storage of the car with Mr. Harwood at the time, but I believe his attention was called to the car being stored at Harwood's warehouse shortly afterwards.

Under the evidence we have, it appears the railway made proper delivery, and is not further interested in the case.

Yours very truly, J. W. King, Freight Claim Agent.

JWK/L.

[fol. 75] **Exhibit Porter A**

The Chesapeake and Ohio Railway Company

J. W. King, Freight Claim Agent

Richmond, Va., July 15th, 1926.

Mess. Hall, Hall & Peachy, Attorneys-at-Law, Travelers Building, Richmond, Va.

Gentlemen:

Claim #495712-1

Replying to your letter July 7th, in regard to claim of H. E. Martin and W. H. Porter for value potatoes in FGE Car 41759, consigned Michigan Potato Growers Exchange, Advise Mr. Martin at Richmond, shipped in November 1925.

I do not see that there is anything we can do in this case. There being no liability upon the Railway, the claim is respectfully declined. As stated in my letter June 7th, the car was delivered to Harwood's warehouse for storage upon Mr. Martin's order and after he had paid the freight thereon. It appears he was under the impression that the car was in another storage warehouse; and, when he made inquiry, was informed shortly afterwards the car was at Harwood's. Notwithstanding this, he took no action, I am informed, to dispose of the potatoes, but permitted them to remain in storage for several months until they had badly det-riorated.

Yours very truly, J. W. King, Freight Claim Agent.

JWK/L.

D. S. Harwood, a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

[fol. 76] Examination in Chief.

By Mr. Hall:

Q. Mr. Harwood, please state your residence and occupation?

A. My business residence is 1426 and 1428 E. Cary Street. My residence is Stuart Court Apartment.

Q. Your occupation?

A. Commission merchant and manufacturers' agent.

Q. Mr. Harwood, did you ever have any arrangement with Mr. W. H. Porter and Mr. H. E. Martin for the storage of potatoes during the fall of 1925?

A. No, sir.

Q. Did you know Mr. Porter and Mr. Martin at that time?

A. No, sir.

Q. Had you ever heard of either one of them?

A. No, sir.

Q. It appears that, under date of November 24th, 1925, you unloaded a car of potatoes, F. G. Ex. 41759. Is that a fact?

A. I can't remember it. If there is any evidence to that effect there—Did I make any statement to that effect? You seem to have a letter there of mine. It is on blue paper.

Q. Will you please refer to your letters of May 10th, 1926, and May 19th, 1926, heretofore filed as "Exhibit Porter #5" and "Ex. Porter #6", and state whether or not you did, on November 24th, 1925, unload a car of potatoes in car F. G. Ex. 41759?

A. I did.

Q. Mr. Harwood, where did you unload them?

A. In my warehouse.

Q. How did they come there?

A. The railroad company delivered them.

Q. How did you happen to unload them?

A. I had been receiving a number of cars from different ones on Cary street there and I had taken in—I don't know whether this was the last lot I took in or not, but there were 14 cars that I put in my warehouse. Quite often it is the case that my friends have sent me cars to put in there for a day or two, on a short time, and I thought this car belonged to Mr. Ahern since he ordered several cars to my warehouse; and, when the car arrived, I immediately unloaded it and never asked any question. My agreement with the Southern Railway Co. was a reciprocal demurrage [fol. 77] proposition. I never took more than a day to unload a car, reserving the extra time, on account of the reciprocal proposition, that I might use for other cars that might be delayed.

Q. How many cars did you unload in a day?

A. One.

Q. At that time you had, if I understood you correctly, an arrangement there for storing potatoes for Mr. Ahern, did you not?

A. Yes, sir.

Q. When this car was placed there at your warehouse by the railway company, no information was furnished you by the railway company as to whose potatoes they were?

A. Not by them or by Mr. Ahern either.

Q. Mr. Ahern had nothing to do with putting them there as far as you know, did he?

A. No, sir.

Q. If I understand you correctly, you found this car there placed at your warehouse by the railway company?

A. Yes, sir.

Q. And sometimes deliveries are made and the authority or information as to exactly whose merchandise it is doesn't reach you for a day or two; is that correct?

A. In this particular case it did not. Usually I have notification prior to the placing of cars, that a car will arrive and to take charge of it, or take care of it; and, having had a number of cars coming to me and knowing Mr. Ahern had several cars, I thought the car, as I said, belonged to Mr. Ahern. I unload cars also for other parties as well.

Q. When did you find out that this wasn't Mr. Ahern's car?

A. This letter I think explains it—May 10th, 1926. I will read that if you wish.

Q. That has been read. That is the first time you knew anything about it not being his car?

A. Yes, sir.

Q. In what condition did those potatoes come in May, 1926?

A. The condition of the potatoes and all the potatoes that I received at that time was that they were apparently in very good condition.

Q. What was their condition in May, 1926?

A. When I wrote that letter they were in pretty bad shape.

Q. Did you dispose of those potatoes at the best figure obtainable for them on the market?

[fol. 78] A. I did.

Q. I hand you what purports to be your letter of July 14th, 1926, to Mr. Martin, filed as "Ex. Harwood #2" and a copy of statement of the disposition of this car of potatoes, filed as "Ex. Harwood #1," and ask you if that is your letter of that date to Mr. Martin?

A. Yes, sir.

Mr. Hall: Please read that letter.

Witness: That letter was written by me on July 14th and signed by me on that date.

Note.—Papers identified by witness were filed, marked "Ex. Harwood #2" and "Ex. Harwood #1."

Q. Enclosed in that was a statement as to the disposition of these potatoes?

A. Yes, sir.

Q. Will you please refer to that statement and tell the jury whether or not you got the best salvage value obtainable for those potatoes?

A. I did.

Q. Please tell the jury what you had to do, or did, in disposing of those potatoes, and how many of them could be sold and at what price, etc.; in other words, give a full account of that transaction.

A. My account sales read as follows: "Sale of car of potatoes, #41759—260 sacks—received November 24th, 1925." The account sales was made on July 14, 1926. On May 25th I sold 15 sacks for $3; on the 27th, 45 sacks for $2.50; on the 29th, 10 at $2; on June 8th, 23 sacks at $1. There was a loss of 167 sacks, which I sent to the crematory, making a total of 260 sacks. "To labor, overhauling 60 sacks at time of original unloading"—On those sacks there were some little spot places and it was probably necessary for their protection; it didn't amount to very much except they had to be handled—"12.00. Storage on 260 sacks from November 24th, 1925, to date of sale, flat rate, including insurance, $52. Reconditioning at time of last sale $37.50. Drayage on deliveries, 83 sacks at 5c,

$4.15. Ninety-three sacks used in reconditioning at 8c, $7.44. Drayage on rotten potatoes to crematory $7.50. Commission on 93 sacks sold $9.30. Check subject to your order $70.61", making a total of $200.50.

[fol. 79] Q. $200.50 was the gross amount realized on those potatoes from May 25th to June 8th?

A. Yes, sir.

Q. And as against that $200.50 you have?

A. $70.61.

Q. Your charges reduce the net amount to $70.61?

A. Yes, sir.

Q. You are holding, subject to claim of the proper party, the sum of $70.61?

A. In accordance with my letter of July 14th.

Q. Did you recondition as far as possible and dispose of those potatoes to the best advantage on the Richmond market?

A. Yes, sir.

Q. Considering their condition, etc.?

A. Yes, sir.

Q. Will you please refer to this what appears to be copy of delivery receipt on this car, and state whether or not the name D. S. Harwood appearing thereon is you- signature?

(Handing witness paper marked "Ex. Harwood #3".)

A. Well, it certainly appears so, but between the "a" and "w" there are two lines which do not correspond to the plan that I sign my name. I think as to the letters in general—I would not swear that I didn't sign it. I don't believe I did.

Q. Do you know whose signature it is?

A. No, sir, I do not. On the other hand, I believe I would swear that it was not mine, but it is a very good reproduction of my writing.

Q. When was the first time you ever saw this paper as far as you know?

A. I couldn't tell you.

Q. Did Mr. Clarence Wyatt or any one else for the Bowman Company make any arrangements with you for the storage of these potatoes?

A. I don't recall any.

Q. Did they ever pay you any storage on it?

A. No, sir.

Q. Did Mr. Clarence Wyatt ever offer you any storage on it?

A. I don't recall that he ever did.

Q. Or Mr. Clarence Wyatt, Jr.?

A. I don't remember either one.

[fol. 80] Q. Did anybody ever pay you any storage on these potatoes until it was deducted on that statement there?

A. No, sir.

Cross-examination.

By Mr. Spicer:

Q. This particular car contained 260 sacks of potatoes?

A. Yes, sir.

Q. You have an item on this account, for overhauling 60 sacks at the time they were put into your warehouse?

A. Yes, sir.

Q. Do you know why that was made necessary?

A. For the preservation of the property.

Q. You stated, I believe, that you stored potatoes during that season for numerous other parties?

A. Yes, sir.

Q. Are conditions in your warehouse good for the storage of potatoes?

A. Yes, sir. There was a gentleman here from Michigan two days ago, who said he thought I had the best warehouse for storing potatoes of any he had seen in the South.

Q. Do you know why the potatoes involved in this case should have been subject to any unusual deterioration prior to January 1st, 1926, in your warehouse?

A. I don't quite catch that.

Q. Would there be any reason why this car of potatoes stored in your warehouse should suffer any unusual deterioration between the last part of November and the first part of January? In other words, were the storage conditions all right?

A. They were normal conditions.

Q. As far as the condition of the potatoes is concerned they would be in as good condition in your warehouse as anybody's warehouse after having been stored for that period?

A. I think they would have been better, because my warehouse is considered better.

Q. So that, if the contention is made in this case, they were delivered to your warehouse in error, there is no reason why there should be any loss to the owner of the potatoes if he had moved them out after a reasonable time?

A. I think the jury can decide that.

Q. I mean no difference in the condition of the potatoes attributable to your storage warehouse that would not have been true as to any other storage warehouse?

[fol. 81] A. I don't know how to answer that exactly. What are you trying to get at?

Q. I am trying to ask you, if those potatoes had been removed from your warehouse in January, 1926, would they have been in as good condition as they would have been if stored in any other warehouse?

A. I imagine they would.

Q. When those potatoes arrived you thought they belonged to Mr. John Ahern?

A. I did.

Q. Did you have occasion to see Mr. Ahern any time thereafter?

A. I saw him nearly every day, maybe once or twice a day, but I never made any question. The fact that Mr. Ahern had been delivering me cars of potatoes, I just took them in, and I never gave Mr. Ahern a receipt for any cars of potatoes. I have four cars right now belonging to him. I never gave him a receipt for them.

Q. When did you first mention to Mr. Ahern this particular car as far as you recall?

A. On May 10th I wrote to Mr. Martin.

Q. You had then conferred with Mr. Ahern before writing this letter?

A. I asked Mr. Ahern—If you wish, I will read the first portion of the letter, which will give the information.

Q. I just want to know the approximate date.

A. Well, May 10th.

Q. About May 10th you spoke to Mr. Ahern about it?

A. Yes, sir.

Q. That was the first occasion, as far as you recall, mentioning this particular car to Mr. Ahern?

A. Yes, sir.

Q. Did you ask any of your other customers about it in that period?

A. No, sir.

Q. Did you assume that the potatoes would be good for the storage that would be due?

A. Yes, sir.

Q. You said you didn't recall any conversation with Mr. Clarence Wyatt, Jr., regarding the storage on this shipment of potatoes, which had been tendered him by Messrs. Martin and Porter?

A. No, I don't recall any conversation with him.

Q. Would you be in a position to say that Mr. Wyatt had [fol. 82] not mentioned the subject to you, or you just don't recall it?

A. I don't recall it.

Q. Do you know whether or not you paid any demurrage on this car?

A. I did not. If I did, I would have jut it on that bill.

Q. You were working under an average agreement arrangement with the Southern Railway Co.?

A. Yes, sir.

Q. You just received a bill at the end of the month instead of receiving a bill on each car?

A. They were pretty prompt in sending bills.

Q. Under the average agreement, you only received a bill monthly, isn't that true?

A. You misunderstood me, I guess. Bills for charges for demurrage would probably be sent me maybe ten days or two weeks after the demurrage would accrue; but, since there was no demurage on this and there was no charge for storage, there was no bill presented.

Q. Are you positive of that?

A. To the best of my knowledge and belief, yes, sir.

Q. Isn't it true that you paid demurrage to the Southern at the end of the month?

Witness: On that car?

Mr. Spicer: I mean generally—your arrangement for paying demurrage.

A. I don't have any demurrage on our reciprocal demurrage agreement. When a car is placed there I immediately take it.

Q. You receive credit when you release a car before the free time expires?

A. Yes, sir. They keep a record of it. I have had the Southern to make claim against me two months after the transaction occurred, and I would meet them with the proposition that I had had a reciprocal agreement with them, and I cancelled their charge. They have had a fifteen dollar charge against me and I wouldn't pay any more than, say, two dollars.

Q. It very often worked out your debits exceeded your credits?

A. Yes, sir.

[fol. 83] Redirect examination.

By Mr. Hall:

Q. What caused these potatoes to depreciate so?

A. Natural condition, I suppose. I just reconditioned 1,440 sacks and I got, I think 916 sacks of good ones out of the lot. This man from the West was here and he saw the potatoes were being conditioned.

Q. How could the Southern Railway Co. get a claim of $15 demurrage against you? You unloaded a car the day it arrived there, did you not?

A. Yes, sir.

Q. How would they get a claim of so much demurrage on one car?

A. It was not on one car. Do you refer to that particular car or just my statement a while ago?

Mr. Hall: Your statement.

A. (continued). That was an accumulation of probably thirty or sixty days. I have credit with all the railroads and they don't make out their reports so quick on that service proposition. That is the reason why they delayed in sending me statements.

Q. When does your free time on a car expire up there?

A. I don't quite understand you.

Q. As to what time that they start charging you demurrage on a car delivered at your warehouse.

A. Well, demurrage charge is never made on any cars put in my warehouse. Demurrage charges come in this way: Quite often I get five or ten carloads of sugar from the New York boat, and, if those cars are not unloaded in a certain time—they have so many days, and, if they don't get unloaded in a certain time, they charge me for a certain number of days for the storage of the cars; and those cars, which I have unloaded promptly during that time, and having free use of the track beyond the one day for unloading, they credit me with that number of days on as many cars as I have to my credit.

Q. How would five or ten cars of sugar come to your warehouse?

A. They come on the Southern road.

Q. Do you get as many as ten cars at the same time?

A. No, sir. I have had as many as ten cars come from [fol. 84] New York, 4,000 sacks, 400 sacks to a car; and those cars are loaded and placed at my warehouse for unloading. For instance, if four or five cars are loaded in consecutive order, and I get my credit on those cars, I am charged with storage on cars remaining on the yard, and one offsets the other.

Q. I want to see how that works. You sometimes get as many as ten carloads of sugar?

A. I have had, but not as a regular thing.

Q. When that sugar is unloaded from the New York boat it is put aboard cars at the dock?

A. Yes, sir.

Q. How many cars do they bring in a day to your place?

A. One.

Q. They put that there when?

A. Put it during the morning, or during the night, and I unload it during the day and it is moved the following night. There is no privilege of carrying cars at that location except at night.

Q. Then, from the time of the loading of the sugar on cars down at the boat (supposing there were ten cars) until the time the last car is actually unloaded at your warehouse would be a period of some eleven days, would it not?

A. Possibly.

Q. Suppose you have one of this ten car shipment of sugar; do you sometimes have other customers sending in carloads of merchandise during that same time?

A. My business is more of a sugar business than other lines and I don't have very many cars of other merchandise. Most of my sales are for direct shipments to buyers in carload lots; they go to the buyer direct.

Q. Suppose cars came in, just as some of these cars of potatoes for Mr. Ahern, while there were ten cars of sugar awaiting delivery at your warehouse by the Southern Railway, those potatoes of Mr. Ahern would have to wait until the final delivery of all ten of these cars of sugar unless it was put in ahead for some reason, wouldn't it?

A. You are using that ten car proposition, which is not a usual thing; it is more of an unusual thing than a usual thing; and I merely referred to ten cars to show that each car had to come in in its time as arrived.

Q. Each car has to come in in its turn?

A. Yes, sir.

Q. Unless one is sent ahead for some reason?

A. Unless by special request. For instance, a perishable [fol. 85] proposition; of course, I try to protect that merchandise and have that unloaded before I do the other stuff.

Recross-examination.

By Mr. Spicer:

Q. In the usual course of business, how long would it take a carload of perishable goods to reach your warehouse and be unloaded?

Witness: From where?

Mr. Spicer: From the time it reaches the Southern until they have it lined up at your track.

A. I suppose, if they got it today, they would put it in my place tonight and I would unload it the next morning.

Q. So that ordinarily a car of perishable goods would not take more than a day?

A. No.

Q. Before it was unloaded?

A. No, sir.

Q. That would be the normal custom?

A. Yes, sir.

By Mr. Hall:

Q. That would depend upon how many cars ahead of it, wouldn't it?

A. Well, I don't want to leave the impression I am handling so many cars. I am not handling them. Sometimes maybe two or three cars, and then again not so many. If the firm I represent take a notion they want to ship from four to ten thousand sacks of sugar for delivery, I take it in.

By Mr. Spicer:

Q. In the ordinary course of business you wouldn't let the situation arise where you would have as many as ten cars waiting on the outside to get into your warehouse, would you? In the ordinary course of business you would endeavor to regulate the arrival of cars?

A. I don't have anything to do with regulating the arrival.

Q. I mean in agreeing to take them in?

A. For instance, I said ten cars of sugar. The average car today will handle from eighty to a hundred thousand [fol. 86] pounds. I have had ten cars representing 400 sacks each put in five cars, using 800 sacks, loaded at the boat.

Q. Ordinarily, you would endeavor as far as possible to avoid having cars wait on the outside at your track?

A. Sure, to save demurrage.

Witness stood aside.

Exhibit Harwood #2

D. S. Harwood, Manufacturer's Agent

Office and Warehouse: 1426 and 1428 East Cary Street.
Richmond, Va.

July 14, 1926.

Mr. H. E. Martin, Toano, Va.

Dear Sir: I inclose you herewith memorandum in handling car potatoes #41759.

I am not certain whether you are the party to whom I should make these returns, and I am therefore, holding the check that I may be certain as to where same is to be paid.

This is the car potatoes which I stored at which time I understood same belonged to Mr. Ahern.

If you are the party to whom to account, and any further information you want in connection with this, I shall be very glad to respond.

That there may be no misunderstanding in connection with this, if you will furnish me with the freight receipt from the railroad company where you paid the freight for further evidence, I will be glad to pass the check.

Yours very truly, D. S. Harwood.

DSH/PS.

[fols. 87 & 88] EXHIBIT HARWOOD #1

Sales of Car Potatoes #41759 (260 Sacks). Received November 24, 1925

For Acc't of H. E. Martin, Toano, Va.

By D. S. Harwood, Importers' and Manufacturers' Agent, Richmond, Va., July 14, 1926

Cr.:

May 25.	By sale 15 sacks	3.00	45.00
" 27.	" " 45 "	2.50	112.50
" 29.	" " 10 "	2.00	20.00
June 8.	" " 23 "	1.00	23.00
	" loss 167 " Sent to crematory		
	260		200.50

Charges:

Nov. 24.	To labor overhauling 60 sacks at time originally unloading		12.00
	" storage on 260 sacks from Nov. 24/25 to date of sales flat rate inc. insurance		52.00
	" reconditioning car at time of last sales		37.50
	" drayage on deliveries 83 sacks	.05	4.15
	" 93 sacks used in reconditioning	.08	7.44
	" drayage on rotten potatoes to crematory		7.50
	" commission on 93 sacks sold	.10	9.30
	" check subject to your order		70.61
			$200.50

E. & O. E.

(Here follows Exhibit Harwood No. 3, side folios 89 and 90)

Form A. F. 312 4
Revised 4-1925

(125) THE CHESAPEAKE AND OHIO RAILWAY CO.
EXHIBIT HARWOOD #3
DELIVERY RECEIPT

Received from The Chesapeake and Ohio Railway Co.
in good condition the articles described below.

11/12/25 5584

Stop this Car at For

Tonnage for Engine Rating

Gross Tons	Net Tons

Car Initials and Number
FGEX 41759

Transferred to
At

Date 11/6/25 Waybill No. 60

To—	(Station)	(State)
0125	RICHMOND	VA.

From— Number	(Station)	(State)
	Edmore, Mich.	Wyman Mich. P. M.

Full Name of Shipper, Origin and Date, Original Car, Transfer Freight Bill and Previous Waybill Reference When Rebilled

Mich Potato Growers EDC

Route (Show each Junction and Carrier in Route Order to destination of waybill. Indicate by check mark whether Shipper's or Agent's routing.)

TOL H V COL C&O

Shipper's Routing

Agent's Routing

Length of Car		Marked Capacity of Car		Stencilled Wgt. of Car
Ordered	Furnished	Ordered	Furnished	

Consignee, Address (Final Destination and Additional Routing)

Mich Potato Growers Exc
Advise H. E. Martin

Indicate by symbol in column provided * how weights were obtained R—Railroad Scale. A—Weighing Bureau or Agreement. T—Tariff, Classification or Minimum. S—Shipper's Agreement or Tested Weight. E—Estimated (weigh and correct.)

Weighed at..

Gross Tare Allowance Net

Instructions Regarding Icing, Ventilation, Milling, Weighing, Etc.
If Iced, Specify to Whom Icing Should be Charged

1st Transfer	2nd Transfer	3rd Transfer	4th Transfer	5th Transfer

Description of Articles and Marks	Commodity No.	Weight	*	Rate	Freight	Advances	Prepaid
260 Sks. Potatoes							
Fulton EP		39000		53½	20865		
(C. & O. Ry. Co. Received payment Nov. 16, 1925 G. A. Warthen, Agt. Per........................Cashier)							
(Allow Inspt) D. S. Harwood							

Signature..
By..
Date..............................Time..............................
Checked and Delivered By..

Total to Collect

RECEIVED, in good order from THE CHESAPEAKE & OHIO RAILWAY CO. on account of articles described on reverse side:

Lading		Date	Dray or Truck No.	Signature
No. of Packages	Articles			

[fol. 91] H. E. Martin, a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Examination in chief.

By Mr. Hall:

Q. Mr. Martin, you are one of the plaintiffs, are you?

A. Yes, sir.

Q. Do you know the fair value of this car of potatoes involved in this action, that is, F. G. Ex. 41759, in the month of November, 1925?

A. Yes, sir. They were considerably higher than what we paid for them.

Q. Were they worth at least the amount which you paid for them, plus the freight?

A. Yes, sir.

Q. Did potatoes advance or drop in price from the latter part of November, 1925, to the spring of 1926?

A. The market fluctuated, first one way and then the other, but the tendency was upward all the time.

Q. Now, Mr. Martin, in the letters from J. W. King, Freight Claim Agent of the C. & O. Railway Company (Exhibit Martin #3 and Exhibit Porter A), dated June 7th, 1926, and July 15th, 1926, respectively, this claim was rejected, and it was stated by Mr. King that this car was delivered to D. S. Harwood's warehouse for storage after Mr. Martin had paid the freight and upon his order, the same statement appearing in both letters. Will you please state whether or not you ever ordered or directed or authorized the delivery of this car of potatoes to D. S. Harwood?

A. No. I didn't know Mr. Harwood. We sent all our potatoes to the Bowman Transfer & Storage Co., and I instructed that one to be sent there.

Q. Did you ever have any business transactions of any kind before this time with D. S. Harwood?

A. No, I did not.

Q. Did you know him?

A. Didn't even know him.

Q. Did you give any directions as to the delivery of this car of potatoes?

A. Yes. I instructed that they be sent to the Bowman Transfer & Storage Company.

Q. Who did you instruct?

A. I think it was Mr. Neiss. He is the one I have been doing all the business with.

[fol. 92] Q. Mr. Martin, in his opening statement, counsel for the railway company, stated that you had given written directions to the railway company for the delivery of eleven cars of potatoes to the Bowman Warehouse Company, but had given no written directions for the delivery of any other cars of potatoes. I ask you to state what transaction you first had with the railway company in reference to the delivery of the potatoes purchased by you and Mr. Porter during the spring and fall of 1925 for delivery in Richmond?

A. The first car we had to come in there we had to pay switching charges on, and Mr. Heiss suggested we give him the number of the cars that we expected in, which I did. I gave him the number of cars I had invoices on, and instructed him to send them to the Bowman Transfer & Storage Co.

Q. I hand you here a memorandum marked "Ex. Martin #4," under date of October 27th, 1925, with certain car numbers, totaling 11 cars appearing on it, and that statement in the following language: "Potatoes consigned to order notify myself, on arrival notify Bowman's Warehouse and switch to their siding, Virginia Street building upon surrender of bill of lading," with your name at the bottom of that. I ask you whether or not that is the memorandum to which you refer?

A. Yes, sir, this is the one that I gave him.

Q. In whose handwriting is that, do you know?

A. I couldn't say, but I gave it to Mr. Neiss, consequently I guess it is his handwriting; I imagine it is.

Q. Is that your signature there?

A. That is my signature, yes.

Q. Is this memorandum there in your handwriting?

A. No, it is not.

Q. Just your signature?

A. That is all.

The Court: Read that paper.

Mr. Hall (reading): "Potatoes consigned to order notify myself, on arrival notify Bowman's Warehouse and switch to their siding, Virginia street building, upon surrender bill of lading." There are certain abbreviations on there. I would like for the jury to see this. (Passing paper to jury.)

Q. Now, Mr. Martin, does this list of car numbers there include the car involved in this action?

[fol. 93] A. No, it does not.

Q. Please state whether or not that memorandum was before or after the shipment of the car in question?

A. That memorandum was before the shipment of the car in question.

Q. Did you then have the car number of this car?

A. No, I did not.

Q. How many cars, in addition to these eleven here and one I believe you say on which you had previously paid a switching charge, did you receive for storage in Richmond during that season?

A. Sixteen cars all together were accepted.

Q. There were four more cars in addition to these accounted for in this memorandum and the previous one on which you paid a switching charge?

A. Yes, that is right.

Q. One of those four was the car in controversy here?

A. Yes.

Q. What happened to the other three cars?

A. They were rejected.

Q. I mean the other three cars of the sixteen that you received and accepted?

A. They had been sent to the Bowman Transfer & Storage Warehouse.

Q. Is this car in controversy the only car of the entire sixteen that was not sent to the Bowman Warehouse?

A. Yes, that is the only one.

Q. Mr. Martin, do you know anything of your own knowledge about how the mistake, if it was a mistake, occurred on the delivery of this car by the railway company to Harwood instead of Bowman?

A. The only thing I know about it is that we went to the C. & O. to get whatever information we could get. They had an order there that they had sent that car there by the order of the shipper, or Rose; I don't know which it was; but they sent that car to Harwood by their instructions.

Q. You recall it has been shown in evidence a letter under date of December 22nd from Clarence Wyatt, Jr., saying that the receipt, which had been issued to you for this particular car, was issued in error. What did you do upon receipt of that letter?

A. Mr. Porter and I came to Richmond to investigate it, and we were assured that the car had been received and stored at Wyatt's warehouse.

[fol. 94] Q. Did you hear the testimony of Mr. Porter as to what happened on that investigation?

A. Yes, sir; I heard that.

Q. Was his testimony a fair account of what happened when you came to Richmond in reply to that letter?

A. Yes, it was.

Q. Were you with Mr. Porter at the time concerning which he testified when you saw Mr. Wyatt about that particular car?

A. Yes, I was with him.

Q. If I understand correctly, you came to Richmond the first time and didn't see Mr. Wyatt?

A. Yes, sir; that is right.

Q. Did you make inquiry for Mr. Wyatt?

A. Yes. His wife or Jesse, the man who had charge of it, none were able to locate him.

Q. What happened on your second trip?

A. We found Mr. Wyatt, and he went over to the warehouse with us, and we were assured the potatoes were there.

Q. Was Mr. Wyatt satisfied of that?

A. He seemed to be perfectly.

Q. Were you and Mr. Porter satisfied that the potatoes were there from what you saw?

A. Yes, we thought they were there. He showed us the potatoes. They checked up all right.

Q. Was there any reason at that time, Mr. Martin, which would have made it to your advantage not to immediately go for those potatoes if you found they were elsewhere?

A. None whatsoever. We wanted the potatoes. We bought them on a good market and felt perfectly satisfied with them.

Q. On the existing market could you or could you not have sold them at a profit?

A. Yes, sir; very easily.

Q. Did you sell the other potatoes in this same transaction at a profit?

A. Yes, we made some money on them.

A. Now, Mr. Martin, Mr. Porter has testified that you handled the money on this deal. Did you pay storage to the Bowman Company on the potatoes stored with that company?

A. Yes, I paid them for all on the 16 cars.

Q. Did you pay them storage for 15 cars or 16 cars?

A. Sixteen cars.

Q. Did Mr. Wyatt ever request again the return of his receipt for the particular car here in question?

[fol. 95] A. No, he never said anything about it.

Q. If I understand correctly, then, all three of you accepted as a fact that the 16 cars were there?

A. Oh, yes, we were all satisfied.

Q. Up to what time approximately did you pay storage on the sixteen cars?

A. Well, we didn't start moving them until April. I imagine up until about the first of April.

Q. You paid storage on 16 cars up to the time you started moving some potatoes out of the warehouse?

A. Yes.

Q. Mr. Martin, referring to the two letters from Mr. Harwood, dated May 10th and May 19th, respectively, (Exhibit Porter #5 and Exhibit Porter #6), will you please state to the jury as briefly as you can, but in substance, just what you and Mr. Porter did upon receipt of those letters?

A. When we got the letter we came up to Mr. Harwood's warehouse and looked at the potatoes, found they were practically worthless, and I went to see Mr. Wyatt, too, in reference to them. I believe that is about all we did until we took it up with you.

Q. How many trips did you take to Richmond in reply to these letters prior to consulting me?

A. Two trips.

Q. What was the condition of those potatoes when you came to Richmond on receipt of the letter of May 10th?

A. They were practically worthless.

Q. Mr. Martin, there is an addition on the bottom of this letter directed to "Mr. Herbert." What is your first name?

A. Herbert.

Q. Does that mean you?

A. Yes, sir.

Q. Before reading that letter will you please state how that came on that letter?

A. I left this letter with Mr. Wyatt to investigate it. His investigation—— Must I read what he found out after he investigated it?

Q. Is that what Mr. Wyatt reported as the result of his investigation?

A. Yes.

Q. I ask you to read it to the jury.

A. "The C. & O. has at last reported they have sent this car to D. S. Harwood's warehouse without any written order from you." Signed "Clarence Wyatt, Jr."

Q. If I understand correctly, that was Mr. Wyatt's re- [fol. 96] port to you after you had sent to, or left this letter with him for investigation of the facts stated by Mr. Harwood?

A. Yes.

Q. Now, Mr. Martin, where do you live?

A. Lanexa.

Q. What is your business and occupation?

A. Merchant there.

Cross-examination.

By Mr. Spicer:

Q. This car arrived at Fulton yards on November 12th, did it not, or it was seen there by you and Mr. Lee and Mr. Porter on that day?

A. No, it was not seen on that day by us.

Q. It was inspected, and were you there with Mr. Lee when it was inspected?

A. We were there on one inspection. I was there about the 16th when we inspected the car.

Q. Four other cars came in practically at the same time and you rejected those?

A. Yes.

Q. You say your dealings at the Ninth street freight station of the C. & O. were largely with Mr. Neiss?

A. Yes, sir.

Q. Do you construe this memorandum or writing here, dated October 27th ("Exhibit Martin #4") as being an order to deliver these eleven cars mentioned on here to the Bowman Warehouse, or was your order for the delivery of these cars to the Bowman Warehouse?

A. Those are the numbers of cars I gave him. Of course, he wrote that there and asked me to sign it, which I did.

Q. You understood when you signed this you were signing an order for the delivery of these cars?

A. I don't know whether you term it an order or not. It was a memorandum of the number of cars I was expecting and where they were to be sent.

Q. Anyway, that was authority for him to deliver these eleven cars to the Bowman Warehouse?

A. Yes, sir.

Q. Do you recall giving any such authority for the delivery of the car involved in this suit?

A. Yes.

Q. What kind of authority?

A. Just verbal. They knew just where they were going.

Q. When did you give him an order covering this? Was [fol. 97] there any blanket order covering all of these cars?

A. No, I don't think so. I don't think I gave him a blanket order. I know all the cars, Mr. Neiss understood, were to be delivered to the Bowman Transfer & Storage Company.

Q. You don't think you gave any blanket order for the delivery of all cars?

A. I didn't give any written order.

Q. Any other kind of order?

A. Just instructions for all to be sent to the Bowman Transfer & Storage Co.

Q. Mr. Porter said that no particular order was given at the time this car was accepted and freight was paid on it—didn't give any individual order on this particular car.

A. Well, it was understood all were to be sent there.

Q. I mean when you went to the freight station and paid this freight bill, you didn't give any specific order on this car for its delivery to the Bowman Warehouse?

A. Well, it was understood all would have to go there.

Q. Just answer the question. I just ask you, Mr. Martin, at this particular time when you paid the freight on this car, did you give any order, written or verbal, for delivery to the Bowman Warehouse Company?

A. Yes, I gave an order.

Q. Mr. Porter said no order was given at that time. You were present, were you not?

A. Yes.

Mr. Spicer: He said that he was present and no order was given.

Mr. Hall: He said no written notice was given.

Mr. Spicer: I may be mistaken about that.

Witness: I think you are.

By Mr. Spicer:

Q. Did you give any order to any other railroad for the delivery of any of these cars, or did all come over the C. & O.?

A. It is possible two or three cars came over some other line.

Q. That is, including the sixteen cars?

A. No, I don't think so. Of course, I wouldn't be positive on that.

Q. Do you recall giving any blanket order for the R. F. & P. for the delivery of any of these cars?

A. The first car came over the R. F. & P. Road; I went up [fol. 98] there and told them I was expecting right many; in case they came in, I wanted them to be sent to the Bowman Transfer & Storage Co. I don't think anything was written about it.

Q. Was Mr. Neiss (the gentleman here) on the occasion when you paid the freight on the car involved in this case, in the office; do you remember?

A. I don't remember, but I think so.

Q. Did you say anything to him on that occasion? Did you give this order to him?

A. I don't know whether I gave it to him or not. I know we did all our business through him.

Q. Do you remember about what time of day it was when you were in there?

A. It was sometime in the morning.

Q. You didn't go to the C. & O. Railway Co. or to D. S. Harwood on the occasion of your first visit to Richmond after receiving Mr. Wyatt's letter of December 22nd, in which he advised you the potatoes were in Mr. Harwood's warehouse?

A. No, sir; we didn't see either one. We went to Mr. Wyatt's and were satisfied the potatoes were there and consequently dropped it.

Q. The first time you came you didn't see Mr. Wyatt?

A. No, sir; couldn't locate him.

Q. You didn't think it necessary to go to the C. & O. or D. S. Harwood's?

A. Not until we found out all the particulars.

Q. Do you recall Mr. Wyatt offering to return to you the storage on this particular car?

A. No, I do not.

Q. Do you recall whether or not the receipt, which was given you by Mr. Wyatt for this car, was a negotiable receipt or a memorandum receipt that was not negotiable?

A. We had a negotiable receipt for 14 cars.

Q. Do you know whether or not this car was covered by it?

A. I wouldn't state positively, but I imagine it was.

Q. You don't know the date of that negotiable receipt?

A. Not exactly. We turned that in when we got the potatoes.

Q. You paid the freight on this car on November 16th. Do you know whether this receipt was issued before or after the 16th of November?

A. I would not be positive on that.

[fol. 99] Q. Wasn't the receipt that was given for this car in that form (indicating)?

A. That is one of the receipts for each car separate, but we had a negotiable receipt for the whole fourteen.

Q. This receipt is not in negotiable form?

A. No.

Q. You came to Richmond along with Mr. Porter at various times during the first part of 1926?

A. Yes.

Q. You didn't know the car was missing until your attention was called to it by Mr. Harwood?

A. That is the first time I knew we were short a car.

Q. How often would you go to the warehouse would you say?

A. I imagine we went there once a week, sometimes more; sometimes we were not there for a week or so.

Note.—It is agreed by counsel that November 15th, 1925, was Sunday.

Redirect examination.

By Mr. Hall:

Q. It is shown in evidence here that the transaction in reference to the payment of freight and the delivery, etc., took place at the 9th street office of the C. & O. Railway. In order to get it clear in the record, was that the building at the corner of 9th and Main (the First National Bank Building) or some other building?

A. That is down the street further, between Cary and the railroad yards.

Q. Down towards the river, isn't it?

A. Yes.

Q. It is a right good size office?

A. Fairly good size.

Q. Number of clerks in there?

A. Right many.

Q. You were not a particular friend of Mr. Neiss, were you?

A. No, I didn't know him before we had some potatoes shipped in.

Q. Did you ever have any conversation with Mr. Neiss or any of the railroad men after the receipt of the letter of May 10th from Mr. Harwood?

A. Yes. We went by there and tried to trace the car—Why it should have been delivered to Harwood. They [fol. 100] showed us an order there that they had instructions for it to go to Harwood's warehouse.

Q. Who went around there?

A. Mr. Porter and I went together.

Q. Did you have any conversation with Mr. Neiss about delivery?

A. Yes, we discussed it.

Q. Did he make any statement about instructions for delivery?

A. No. He said all of them were to go to Bowman Storage Co.

Witness stood aside.

Plaintiffs rest.

EXHIBIT MARTIN #4

Chesapeake and Ohio Railway Company

10/27/25

MDT 18567
MC 80644
CB&Q 35261
B&O 184235
GTW 581905
PM 25070
CB&Q 120463
PM 53524
PM 81040
Sou 153104
PM 80726

Potos consigned to order notify myself on arrival notify Bowman's Whse & switch to their siding Va. St. Sdg. upon surrender B/L (Sou)

H. E. Martin.

The defendant to prove and maintain the said issues on its part, introduced the following evidence:

W. R. MILLER, a witness on behalf of the defendant, being first duly sworn, testified as follows:

[fol. 101] Examination in chief.

By Mr. Spicer:

Q. What is your occupation?

A. General yardmaster C. & O. Railway.

Q. Richmond?

A. Richmond.

Q. Your jurisdiction covers Fulton yards of the C. & O.?

A. Yes, sir; covers all terminals—Fulton, Second street and 17th street.

Q. Do you know when the car involved in this suit, car F. G. Ex. 41759, containing potatoes, arrived at Fulton yards?

A. From my records it arrived in #92 at 1.40 A. M., 11/12/25.

Q. That means November 12th, 1925?

A. Yes, sir; 1:40 A. M., conductor Fleming.

Q. What subsequently became of that car?

A. It was finally delivered to the Southern Railway.

Q. When was it turned over to the Southern Railway?

A. On the 17th.

Q. Of November?

A. Same month—November.

Q. What time of day?

A. 4 P. M.

Q. How far is it from the place that that car was located at Fulton yards to the place that you delivered it to the Southern Railway?

A. I presume it is half a mile or such a matter, maybe a little more.

Q. Is that what you call the interchange track?

A. Yes, sir; regular interchange between the Southern and the C. & O.

Q. Do you deliver all cars to the Southern to that track?

A. Yes, sir. I say that—if there is a car too high to go under the bridge, we make arrangements to take them around the river, but that don't happen once in six months. This car wasn't too high. That car was all right. I just didn't want somebody to say they knew we did deliver one or two the other way. We do that once in a while.

Q. This car apparently, Mr. Miller, was delivered to the Southern for delivery to the warehouse of D. S. Harwood?

A. Our records show that, yes, sir.

Q. It is claimed that it should have been delivered to the warehouse of the Bowman Transfer & Storage Warehouse Company, also located on the Southern Railway, having [fol. 102] location on Virginia street. Would either of those directions require the same movement on the part of the C. & O.?

A. Same movement on the part of the C. & O.

Q. Occupying your position, what would be a reasonable time for the execution of such a movement on the part of the C. & O.?

A. That depends greatly upon the time that the agent would turn the car loose. If it was in the evening, we would deliver it the next morning because our interchange closes at 5:15, but if it was around morning we would deliver it that day, or that evening.

By Mr. Hall:

Q. You would deliver it on the tracks to the Southern?

A. Yes, sir. That is as far as we have anything to do with it.

By Mr. Spicer:

Q. At any event, it would take less than twenty-four hours to execute the movement?

A. I would think so, yes, sir.

Q. What would be the procedure necessary in case an order was given at 9th street by a consignee or party owning a shipment?

A. They call up by telephone and tell us there is a certain car for a certain party, order notify, now ready for delivery, and then our clerk makes out the necessary orders, what we call a switching order, and gives to the assistant yardmaster to deliver that car, and then we receive written instructions to confirm the phone conversation, which we file.

Q. You don't have to wait for the written order to execute the movement?

A. No, sir.

Cross-examination.

By Mr. Hall:

Q. Mr. Miller, you say that this car here involved was turned over by you to the Southern Railway Company with instructions to deliver it to D. S. Harwood?

A. Well, the car was delivered with the regular form, which said for the Southern Railway to deliver that car to D. S. Harwood.

Q. That form is instructions of the C. & O. as to delivering it to the Southern?

[fol. 103] A. Those are instructions we receive from the agent's office.

Q. You affix instructions to the car in some way so that the Southern will know where to take it?

A. Yes, sir.

Q. If this car was delivered to the warehouse of D. S. Harwood by the Southern, it was because of instructions given to the Southern by the C. & O.?

A. They should have delivered the car according to what we call the switching order that I gave them.

Q. Of course, you got your switching order from the freight office?

A. Yes.

Q. Now, who is Mr. E. L. Smith?

A. He is terminal trainmaster.

Q. Is he under you?

A. No, sir; he is over me.

Q. He is over you; you act under his instructions?

A. Yes, sir.

Q. Look at that paper and see what it is. (Handing witness paper.)

A. That is just what I said awhile ago. He phoned that to one of our clerks, and he said "Confirming phone conversation with Miss Smith today, please have the following cars of potatoes consigned to order notify H. E. Martin (and he gives the numbers of four cars) switched to D. S. Harwood's Cary Street Warehouse, Southern Railway". Signed "G. A. Warthen". There is a copy to each one of those men.

Note.—Paper identified by witness filed, marked "Ex. Munson #1".

Q. Mr. D. L. Smith is terminal trainmaster?

A. Yes, sir.

Q. Who is the Miss Smith referred to?

A. She is my stenographer.

Q. Is it not a fact that the substance of this order is that it confirms a phone order from the office of the General Freight Agent, Mr. Warthen, to your department, directing the delivery of the cars mentioned therein in accordance with such order?

A. Yes.

Q. Now, Mr. Miller, please refer to that and state whether or not that order directs the delivery of car F. G. Ex. 41759, the car in controversy here, to D. S. Harwood?

[fol. 104] A. It says so right here—F. G. Ex. 41759.

Q. And, pursuant to orders that you received from your superiors in the Freight Department, you had that car delivered in that way, did you?

A. Yes.

Q. You have no knowledge as to how that particular car got to be included in that order, have you?

A. No, sir. The cars were evidently all on the yard.

Q. Now, Mr. Miller, I am going to ask you to tell me if you can, and, if not, get from your records the information, as to what happened to car F. G. Ex. 27182 on the same day, or within a period of three days thereafter. If such a car was on the Fulton yards of the C. & O. on November 16th, or within three days of that period, you can find out what happened to it, can you not?

A. Yes, sir.

Q. How would you have to get that information?

A. Would have to go to the office or phone to the clerk to get it—find out from my records.

Q. Will you please produce from your records the order for the disposition of that car?

Witness: In other words, you want me to tell when that car came here, who it was for and what was done with it?

Mr. Hall: I would like for you to produce an order like this one for the disposition of it.

By Mr. Hall:

Q. You say this car was turned over to the Southern Railway Company on the afternoon of November 17th, 1925, at 4 P. M.—the car in controversy?

A. Yes, sir.

Witness stood aside.

STIPULATION RE EXHIBIT "A"

It is stipulated between counsel that, if the freight agent of the Pere Marquette R. R. at Wyman, Michigan, were called as a witness, he would testify that the paper herewith filed, marked "Exhibit A" is a copy of original bill of lading issued under date of November 6th, 1925, at Wyman, Michigan, for car F. G. Ex. 41759, consigned from Edmore Marketing Association to Michigan Potato Growers Exchange, advise H. E. Martin, Richmond, Va., which is the shipment involved in this case.

[fols. 105 & 106] EXHIBIT MUNSON #1

The Chesapeake and Ohio Railway Company

November 16, 1925.

Mr. E. L. Smith, TTM.:

Confirming 'phone conversation with Miss Smith to-day, please have the following cars of Potatoes, consigned to order notify H. E. Martin, FGE 27195, FGE 15453, FGE 42884, switched to D. S. Harwood's Cary Street Warehouse, Southern Railway.

G. A. Warthen, G. A.

Copy to J. V. McLeroy, J. E. Tyler, T. S. Davis.

(Here follows Exhibit "A," side folios 107 and 108)

[fol. 109] C. E. WEAVER, a witness on behalf of the defendant, being first duly sworn, testified as follows:

Examination in chief.

By Mr. Spicer:

Q. What is your occupation.

A. I am chief of revision in the office of the auditor of overcharge claims, C. & O. Railway Co.

Form A. F. 1000. Pad 50 sets
Revised 12, 1925

Uniform Domestic Straight Bill of Lading, Adopted by Carriers in Official, Southern and Western Classification Territories, March 15, 1922.

Shipper's No.

Agent's No.

UNIFORM STRAIGHT BILL OF LADING

(Prescribed by the Interstate Commerce Commission)

ORIGINAL—NOT NEGOTIABLE

PERE MARQUETTE RAILWAY COMPANY

1

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading,

Nov. 6, 1925 192

at Wyman, Mich.

from Edmore Marketing Assn.

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to Michigan Potato Growers Exchange,
advise H. E. Martin,

Destination Richmond, Va. State of County of

Route PM—HV— C&O

Car Initial FGEX Car No. 41759

(Delivering carrier)

No. Packages	Description of Articles, Special Marks and Exceptions	*Weight (Subject to Correction)	Class or Rate	Check Column
260	sacks potatoes			
	Shippers load & Count			
	Shippers protective service			
	Standard Ventilation			
	Allow inspection Deliver only			
	on consignees written order			
	without Bill of Lading			

If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See section 7 of conditions.)

(Signature of consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

Note.—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding per

Michigan Potato Growers Exchange Shipper
Per D. Wager

Agent
Per

Permanent post-office address of shipper

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) Claims for loss, damage, or injury to property must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed; provided that if such loss, damage, or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. Suits for loss, damage, injury, or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed: Provided, That in case the claim on which suit is based was made in writing within six months, or nine months in case of export traffic (whether or not filing of such claim is required as a condition precedent to recovery), suit shall be instituted not later than two years and one day after notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to all the terms and provisions of and all the exemptions from liability contained in, the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, and to the conditions contained in this bill of lading not inconsistent therewith or with this section.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General average shall be payable according to York-Antwerp Rules, 1890, and, as to any matter not therein provided for, according to the law and usage of the port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied, it is hereby agreed that in case of danger, damage, or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the ship owner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

Q. As such, does your work deal largely with railway tariffs and classifications?

A. Yes. We are charged with protection of the revenues of the company.

Q. Does it come within the scope of your duty to audit freight bills and see to corrections which support claims for undercharges and also to issue corrections which authorize overcharges to be paid to shippers?

A. Yes.

Q. Have you a general working knowledge of freight tariffs and classifications?

A. Yes.

Q. How long have you been engaged in that kind of work?

A. Four years.

Q. Do you know whether or not, in the scope of your duties, carriers engaged in interstate commerce in this country have adopted any official uniform bill of lading?

Mr. Hall: We object. The bill of lading shows for itself.

Mr. Spicer: We can't make but one bill of lading that will cover the shipment, and I want to prove the form has been prescribed and adopted.

The Court: You have proved the one issued in this case. Is it denied this is in conformity with the usual bill of lading?

Mr. Hall: The bill of lading speaks for itself.

By Mr. Spicer:

Q. I will ask you, have the railway companies in the official Southern and Western Classification Territories adopted a uniform classification of goods or shipments for transportation?

A. It is not uniform. Each has its individual rules, with the exception of the bill of lading; that is uniform for all three classifications.

[fol. 110] Q. There has been a uniform bill of lading adopted by the carriers in this territory?

A. Yes, sir, it is the same bill of lading.

Q. I will ask you if you can state whether or not this bill of lading conforms to the bill of lading contained in the classification? ("Ex. A," heretofore filed.)

A. Yes, sir, as near as you can tell with this much reading on there.

Q. Have you looked over this bill of lading?

A. Yes, sir; I have looked over it and examined it thoroughly, certain sections, and the certain sections do conform to the bill of lading prescribed in the classification.

Q. Will you read section 2 of that bill of lading?

Witness: The whole section?

Mr. Spicer: Section 2 (b).

A. "Claims for loss, damage or injury to property must be made in writing to the originating or delivering carrier, or carriers, issuing this bill of lading within six months after the delivery of the property (or in case of export traffic within nine months after the delivery at the port of export), or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed; provided that, if such loss, damage or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of the claim nor filing of claim shall be required as a condition precedent to recovery. Suits for loss, damage, injury or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed; provided that in case the suit shall be instituted, not later than two years and one day after the notice in writing is given by the carrier to claimant that the carrier has disallowed the claim, or any part or parts thereof, specified in the notice."

Q. Is that provision contained in the classification adopted by the Pere Marquette Railway, the Hocking Valley Railroad and The Chesapeake & Ohio Railway Co.?

A. Yes sir.

Q. Does the bill of lading make any reference to the classification on its face; does it say anything about classification?

[fol. 111] A. It says "Received subject to the classification and tariff; in effect on the date of issue of shipping order."

Q. The form of that bill of lading is set out in the classification adopted by the three railway companies named?

A. Yes, sir.

Witness stood aside.

NOTE.—At 1:30 P. M. a recess was taken until 3 P. M.

W. R. MILLER, a witness on behalf of the defendant, being recalled for further cross examination, testified as follows:

By Mr. Hall:

Q. Mr. Miller, were you able to find the order for the delivery of car 27182, concerning which I asked you?

A. No, sir. The clerk is in the attic hunting for it, but is unable to find the original order yet, but I have the time the car arrived and the time it was delivered to the Southern and the order it was delivered on, the order that we made our duplicate from.

Q. When did that car arrive?

A. That car arrived here on #92 on 11/10/25 at 2:10 A. M.

Q. November 10th?

A. Yes, sir.

Q. When was it delivered to the Southern?

A. Delivered to the Southern Railway on 11/17 at 12:25 P. M.

Q. November 17th, at 12:25 P. M.?

A. Yes, sir.

Q. As a matter of fact that car 27182 was delivered to the Southern Railway before car 41759, was it?

A. Yes, sir; it was delivered about three hours and something before.

Q. But you haven't been able to find any order from the general freight office——

A. No. All I could find was the original of what we call the switching order, or a copy of the switching order, that it went to the Southern, or to D. S. Harwood, order 240815. That is the order which the Southern Railway places the car by.

Q. That switching order is made out by you all?

A. Yes, sir.

[fol. 112] Q. That switching order was made out before you actually received the written order from the general freight office?

A. It is made out sometimes after we get the phone message, and he confirms it.

Q. As a matter of fact that switching order was made out on these cars here pursuant to a phone message from the general office?

A. No. We don't make them out until we get a phone message or a written order.

Q. You get either a phone message or written order from the general freight office?

A. Then the car is not delivered until the written order comes down. Let me explain: Late in the evening he gets an order to deliver a car and he phones the information to us so we can get the car in the proper track, so when the written order comes over the next morning we have the car in shape to take to the connecting line. I think that is the object of phoning the order.

Witness stood aside.

G. C. Waddell, a witness on behalf of the defendant, being first duly sworn, testified as follows:

Examination in chief.

By Mr. Spicer:

Q. Mr. Waddell, what is your occupation?

A. Employed as general yardmaster, Southern Railway.

Q. General yardmaster Southern Railway?

A. Yes, sir.

Q. At Richmond?

A. At Richmond.

Q. Does your jurisdiction extend over the sidetrack serving the warehouses of D. S. Harwood and Bowman Storage & Warehouse Company?

A. Yes, sir.

Q. They are not on the same track, are they?

A. No, sir. One is on Cary street and one on Virginia street.

Q. Can you state when the car involved in this suir, F. G. Ex. 41759, containing potatoes, was received by the Southern Railway Company?

[fol. 113] A. Yes, sir; received from the C. & O. Railway on the 17th of November.

Q. 1925?

A. Yes, sir; 1925, and placed at D. S. Harwood's siding at 3 A. M. on the 24th.

Q. When you said it was received on the 17th of November, where does that mean the car was received?

A. Received at the interchange track.

Q. Interchange track with the C. & O.?

A. Yes, sir.

Q. About how far would a car have to go in going from the interchange track to Harwood's warehouse?

A. Close to two miles; I reckon a mile and three-quarters or a mile and seven-eighths.

Q. How far would a car have to go from the interchange track to the Bowman Warehouse on Virginia, street?

A. The Bowman Storage Warehouse is just about two squares further.

Q. So that the movement in both cases would be approximately the same?

A. Approximately the same. If a car comes from the C. & O. it is placed on the Cary street track the same day of arrival, or the following night, and the same condition on the Virginia street track, where Bowman is located.

Q. So, if the car involved in this suit had been directed to the Bowman Warehouse in this case, it would have been delivered to the warehouse either that night or the following day?

Mr. Hall: We object.

Mr. Spicer: In the ordinary course of business?

A. In the ordinary course of business, if we have no accumulation, it would be placed the following night or perhaps they might have cars in advance of this car, but on an average it is placed the same day.

Q. In the ordinary course of business what would you say would be a reasonable time for the execution of this movement after receiving the car from the C. & O. interchange track, in the movement to the Bowman Warehouse?

A. From six to ten hours.

Q. Do you know when this car was lined up for placement at Harwood's warehouse, when the Southern was in position to place it so far as their facilities were concerned? I mean do your records show that?

A. The car was placed on the night of the 24th at 3 A. M. [fol. 114] and would have been placed before that time if we hadn't had an accumulation. In other words, we had six cars for D. S. Harwood, four received on the 16th and two on the 17th.

Q. So that four or five cars were ahead of this car?

A. Four cars were ahead of it.

Q. Was there any delay in the delivery of this car due to the Southern Railway?

A. No, sir.

Q. Mr. Harwood's warehouse has a capacity of only one car at a time?

A. Yes, sir; one car.

Q. Are you able to shift more than one car at a time for him?

A. No, sir.

Q. Does your record show whether or not cars were shifted in regular rotation in this instance?

A. Yes, sir. The record shows a car was placed every night starting with the 17th.

Q. Would you say, having four to five cars ahead of this, that that was a normal condition of affairs, or was it an unusual situation?

A. That was an unusual condition, unusual. Very seldom we have any accumulation at D. S. Harwood's except one or two cars.

Q. Would your statement apply to other warehouses or customers situated on the Cary street siding and on the Virginia street siding?

A. Yes, sir; except the Virginia Bonded Warehouse. They have an accumulation quite often, and at this time the Bowman Storage & Warehouse Co. have an accumulation.

Q. Do you know whether or not demurrage is assessed on cars held out on account of unusual accumulation?

A. No, sir; I couldn't say.

Q. That is not in your department?

A. No, sir.

Cross-examination.

By Mr. Hall:

Q. Why did you place that car at the Harwood warehouse—car 41759?

A. The car was billed by the C. & O. to D. S. Harwood's [fol. 115] siding. That was the switching order, showing the consignee.

Q. Where did you get that switching order?

A. From the interchange record. The C. & O. Railway delivered that switching order with the car.

Q. You received with that car an order from the C. & O. Railway Company to deliver it to D. S. Harwood, did you not?

A. Yes, sir.

Q. Have you a record there as to whom car #27182 was placed at Harwood's warehouse?

A. Yes, sir. I haven't the order, but I have the date.

Q. What is the date?

A. 22nd. That was the night of the 23rd. 22nd on here, but the engine that placed the car went to work at 8:15. In other words, dated the 22nd, but placed on the morning of the 23rd.

Q. Did you place a car on the morning of the 25th?

A. I have no record.

Q. You say that you had six cars on hand for Harwood, that is, four received November 16th and two on November 17th, did you not?

A. Yes, sir.

Q. When was the last of these cars placed?

A. On the morning of the 24th.

Q. Was one of those cars behind this 41759?

A. No, sir. 27182 was placed on the morning of the 23rd. Both of these cars came from the C. & O. Railway at the same date, on the 17th.

Q. Then, the question as to the length of time that it would take you in getting a car from the interchange switch and placing it at one of these warehouses having facilities for only one car would depend upon the number of cars for that warehouse ahead of that?

A. Yes, sir; yes, sir.

Q. Now, Mr. Waddell, has the Bowman Warehouse (that is the one on Virginia street) facilities for unloading more than one car?

A. No, sir; one car space.

Q. Then, if ten cars came to you on any day for delivery either to the Bowman Warehouse or to the Harwood Warehouse, the first of those cars would be delivered the following morning, would it not?

A. Yes, sir.

[fol. 116] Q. And it would take, including that car, ten days to deliver the ten cars?

A. Yes, sir.

Q. In other words, eleven days from the date of the arrival?

A. Yes, sir.

Q. Now, Mr. Waddell, do you ever recall a case in which Mr. Harwood received as many as ten cars of sugar from the New York boat?

A. No, sir.

Q. If he testified he sometimes received ten cars of sugar from the New York boat—five or ten cars—are you prepared to say that he was incorrect in that?

A. No, sir; I couldn't say. I couldn't say he was incorrect, but I don't know, not to my observing, that he ever received as many as ten cars. We have had three or four cars from the New York Steamship Company for him, but as to as many as ten I couldn't say.

Redirect examination.

By Mr. Spicer:

Q. An accumulation of ten cars is a right unusual situation, isn't it?

A. Yes, sir.

Q. For a shipper having capacity for one car delivery at a time?

A. Yes, sir. Ten cars of sugar at one time it would take fifteen days to deliver to Harwood's siding. The warehouse he is located in has three doors. The building is only for a 36-foot car, and has Gunn on one side and Whitehead Brothers on the other. If we had a forty-foot car for Gunn and his car was the oldest, we would place Gunn's car in preference to Harwood's; so with ten cars in there during that — head and Gunn might have some cars in there during that time.

Q. Does that condition exist at the Bowman Warehouse?

A. No, sir. There is space there for one car regardless of length.

Recross-examination.

By Mr. Hall:

Q. If I understand correctly, the time that it would take for delivery of a series of cars arriving at the same time, [fol. 117] or about at the same time, for delivery to Harwood, would be dependent to some extent upon the size of the car?

A. Yes, sir.

Q. And also would be dependent to some extent upon the volume of arrivals for Gunn's place and his neighbor on the other side?

A. That is right; yes, sir.

Re-redirect examination.

By Mr. Spicer:

Q. When a car arrives and there is an accumulation of cars ahead of it, have you got any kind of notice that you give to the shipper?

A. Yes, sir. The agent furnishes him notice. It don't come in my department. They notify him. They put him on constructive placement.

Q. What does that mean with a shipper?

A. It means he has no free time to unload that car.

Mr. Hall: I object to it as immaterial. There is no evidence there is any such thing as constructive placement of cars in this case.

The Court: Objection is sustained.

Witness stood aside.

D. P. Thompson, a witness on behalf of the defendant, being first duly sworn, testified as follows:

Examination in chief.

By Mr. Spicer:

Q. Mr. Thompson, what is your occupation?

A. Freight agent, Southern Railway.

Q. Was that your position in November, 1925?

A. Yes, sir.

Q. Mr. Thompson, have you had occasion to look up the records of car F. G. 41759, containing potatoes, delivered to the Southern Railway Co. by the C. & O. Railway Co. on or about November 17th, 1925?

A. Yes, sir. I have a part of our records with me.

Q. Will you state what your records show as to the de- [fol. 118] livery of that car from the C. & O.? I just want to get when you got it from the C. & O.

A. Received from the C. & O. November 17th, 1925.

Q. What was done to it?

A. There were other cars on the consignee, D. S. Harwood's siding, and we sent Mr. Harwood a constructive placement notice on this particular car.

Q. When was that sent?

A. That was sent on November 18th, 1925.

Q. Just what did that mean, that constructive placement notice?

A. That meant that we could not place the car at that time on account of Harwood's siding being filled with other cars, and that we would charge demurrage on the car the same as we would if the car were actually placed.

Q. At what time would that demurrage begin to run under that notice?

A. Under the notice his free time would commence on the morning of the 19th at 7 o'clock.

Q. When would the free time be up?

A. He is allowed two days—Forty-eight hours.

Q. Did you subsequently assess demurrage on this car in question?

A. D. S. Harwood was operating under what is known as an average demurrage agreement, and that this particular car earned three debits. Those were partially offset by credits that he earned on other cars the same month.

Q. What did those three debits mean?

A. It means he exceeded his free time by three days in unloading.

Q. Under the average agreement he does not have to pay for each car?

A. No, sir; he pays the net debit.

Q. Over a particular period of time?

A. Calendar month.

Q. There was three debits earned on this car?

A. Yes, sir.

Q. So that in the detention of this car for three days following November 19th demurrage was assessed against Mr. Harwood?

A. Yes, sir.

Q. When was the car finally placed in front of Mr. Harwood's warehouse?

A. On the night of November 23rd, 1925.

Q. Do you have records there which show what Mr. Har-[fol. 119] wood's demurrage account was for that particular month of November, 1925?

A. Yes, sir. There was a net debit, one net debit; that is, two dollars demurrage for the month of November, 1925, which he paid on December 30th, 1925.

Q. Was there anything so far as your records show to prevent the Southern Railway from delivering this car on November 18th except this accumulation of cars in front of Mr. Harwood's place?

A. Our records show that that was the only reason for delay in placing the car.

Q. It is claimed that this car was intended to go to the Bowman Warehouse on Virginia street. Will you state whether or not the movement from the interchange track to the Bowman Warehouse would require any greater time than to Harwood's Warehouse?

A. No, sir. In the ordinary course of business a car delivered us in interchange by the C. & O. one day for a consignee, whose tracks are located on the street, which we term street tracks, the car would be placed that night. We don't undertake to switch street tracks during the day.

Q. Your statement applies to the Bowman Warehouse on Virginia street as well as the Harwood Warehouse on Cary Street?

A. Yes, sir.

Q. And, if the Bowman Warehouse should have an accumulation of cars ahead of it, you would do the same thing as you did in this instance; that is, furnish a constructive placement notice?

A. Yes, sir.

Cross-examination.

By Mr. Hall:

Q. Did you ever have any bigger bill for demurrage against Mr. Harwood than two dollars for the month of November, 1925?

A. I don't recall.

Q. Did you ever have a bill against the Bowman Storage Company for demurrage?

A. I am sure we have collected demurrage from them; yes, sir.

Q. Is it anything unusual about this charging of demurrage against Mr. Harwood?

A. No, sir. It was assessed according to the demurrage tariff.

[fol. 120] Q. And you have with him an average agreement for that very purpose, have you not?

A. Yes, sir.

Q. You also have such an agreement with the Bowman Company, have you not?

A. Yes, sir.

Witness stood aside.

J. A. Neiss, a witness on behalf of the defendant, being first duly sworn, testified as follows:

Examination in chief.

By Mr. Spicer:

Q. What is your occupation?

A. I am assistant chief clerk to the freight agent, 9th street station, C. & O.

Q. You are the Mr. Neiss referred to as having had dealings with Messrs. Martin and Porter during the fall of 1925?

A. Yes, sir.

Q. Will you just state in a general way what transpired between you and those gentlemen in regard to the shipments of potatoes which they were getting from Michigan during October and November, 1925?

A. When the first car of potatoes came in, I did not know who they were or where to locate them, and the car stayed there for a day or so, and finally Mr. Martin came in, and I happened to be the first one that he spoke to; and at that time we didn't have any instructions, so he told me that he was expecting a good many cars to come in (he didn't say how many) and that he was trying to make arrangements with the Bowman Warehouse to take care of these shipments; so then I suggested to him, if he had the numbers of the cars, if he would let me have them, that, regardless of whether we handled them or some other line, we would put instructions out to our yard to switch those cars wherever he wanted them on arrival and avoid paying the switching charge; and I asked him for blanket instructions. He stated he couldn't give me blanket instructions because arrangements hadn't been finished, but he had a list of cars that he said he thought perhaps the C. & O. would handle the majority of, and maybe some other line like the R. F. & P. So then I told him to let me have the numbers and also give the R. F. & P. the numbers of the same cars, and [fol. 121] that we would both look out for them regardless of whatever road handled them, they would be switched without any extra charge. Then he gave me a list that I wrote, myself. I wrote the list of cars myself.

Q. Is this the list you refer to? (Indicating.)

A. Yes, sir. He was calling them out from the invoices and I took the numbers down and wrote the instructions and Mr. Martin signed it. That was the first conversation of any kind that I had with him.

Q. Did that list contain the car involved in this suit?

A. No, sir.

Q. Have you been able to find any written order given on the car involved in this suit?

A. I never had any occasion to look it up until the contention came up about it being at the wrong warehouse, and we were never able to locate anything at all. In fact, I do not recall that car, personally, myself, at all, that particular car, except that order we have with Mr. Harwood's name shown on it.

Q. Is this the order to which you refer? ("Ex. Harwood #3.")

A. Yes, sir.

Q. Do you recall any verbal instructions being given you by Mr. Martin, any blanket instructions, covering all cars coming to him?

A. I don't recall any instructions other than those.

Q. Do you recall any instructions, written or verbal, in regard to the car involved in this suit?

A. They are about the only ones I handled personally.

Q. You don't recall Mr. Martin or Mr. Porter having given you an order as to this car involved in this suit?

A. No, sir. I am satisfied I did not handle the one in question.

Q. Who else at the 9th street station receives orders for the disposition of cars besides yourself?

A. The Cashier. That is the usual place where they go.

Q. Who is the Cashier?

A. Mr. Wilson. I don't collect freight charges. He passes the orders over to my department.

Q. Did you know Messrs. Martin and Porter prior to the time that they came in and told you about these cars that were coming?

A. No, sir.

Q. Mr. Neiss, the bill of lading issued covering this car shows it was consigned from Wyman, Michigan, on November 6th, and the yard records at Fulton show it arraived there on November 12th. Are you in a position to say whether or not that was a reasonable movement?

[fol. 122]

A. Yes, sir.

Q. Would you say it was a reasonable movement?

A. Yes, sir.

Q. Have you had occasion in the course of your experience to handle in-bound shipments?

A. About twenty years.

Q. During the course of that time have you become in a general way familiar with the time required for movements of like character as this?

A. Yes, sir.

Q. What would you say would be a reasonable time for shipment and delivery to a consignee at Richmond of a car under those circumstances from that point?

A. About eight days.

Q. Would anything beyond that be considered a delayed movement?

A. Well, yes, sir; I think it would.

Q. Mr. Neiss, Mr. Martin has testified that freight was paid on this car the morning of November 16th, and order given for disposition to the Bowman Warehouse. Are you in a position to state how long it would take the C. & O. to have that order carried out to the extent of having the car sent to the interchange track?

A. Well, if we give the order to the yard any time up to 4 o'clock in the afternoon, it is usually moved up to 5:15.

Q. The same day?

A. Yes, sir; same day.

Q. Suppose the order is given after 4 o'clock, or received after 4 o'clock, at Fulton yards?

A. It is laid over until next morning between 9 and 1 o'clock.

Q. So that the time required for the carrying out of that order by the C. & O. would be less than 24 hours?

A. Yes, sir.

Q. When was your attention first called to this car, Mr. Neiss, and when was the claim first made so far as you know that it was delivered to the wrong place?

A. My attention was first called to the car by Mr. Ahern. I was passing his place of business several days prior to the time when Mr. Martin came in to inquire about it, and he called me in *and he called me in* and asked if we had switched a car to Bowman's Warehouse for anyone. He said Mr. [fol. 123] Harwood had him credited with a car. So I got the record of the car that same day and went back and looked it up.

Q. About what time did this conversation with Mr. Ahern occur?

A. I should say it was a matter of a week or ten days before Mr. Martin finally came in as near as I can judge.

Q. Mr. Martin, I believe, has testified that Mr. Harwood wrote to him under date of May 10th, 1926, advising him of this car having been unloaded in his warehouse.

A. It was prior to that.

Q. Would you say it was in April or May?

A. It may have been along about the latter part of April or first of May.

Q. You hadn't heard anything about any claim being advanced prior to that that the car was delivered to the wrong place?

A. No, sir. That is the first I heard of it at all, the information he gave me.

Q. Did you subsequently have a conversation with Messrs. Martin and Porter regarding the car in question?

A. I remember Mr. Martin being in once or twice, but Mr. Porter I can recall only one time. He may have been in there, but I can't recall talking with him at all, but I know Mr. Martin on two occasions—I mean about this particular car—and several times prior to that.

Q. That was during the month of May?

A. Yes, sir; just after this thing happened.

Q. It was stated by Mr. Martin, I believe, that, in taking the matter up with you, you remarked that you knew that his cars ought to go to Bowman's Warehouse. What have you to say as to that?

A. I can't recall making such a statement as that. I did say that this car went to Harwood's warehouse, and I told him for what reason. I didn't know until I looked up the order. Then, when we looked up the order, we found that Mr. Harwood's name was shown on the bill, but who put it on there we hadn't been able to determine; and I showed him the order, I think, at the time. I think I had the papers on my desk and brought them over and showed them to him at that time.

Q. Were you aware of any other instruction being given, any blanket instruction being given, by Mr. Martin for the delivery of all of his cars to the Bowman Warehouse?

A. No, sir.

Q. Is this the only order so far as you know that came to your attention? (Indicating "Ex. Martin #4.")

[fol. 124] A. That is the only one.

Q. Your remarks were confined, then, to this particular order?

A. If I made such a statement——

Mr. Hall: That is leading the witness.

Mr. Spicer: All right, sir; I withdraw that.

Q. Do you know what was done with the four other cars that arrived about at the same time these cars did—four other cars of potatoes that were intended originally for Martin and Porter, but refused by them?

A. Four or five, I forget which. They were right along together, either four or five; and the tariff provides that we shall notify the shipper within 48 hours if a perishable car is not delivered. These cars stayed on hand more than 48 hours, and we advised the shipper by wire that the cars were on hand unclaimed. Then there was a wire received from the shipper, turning these cars over, I think, to Alfred Rose, a broker here, for disposition.

Q. Were those other four cars delivered under Mr. Rose's order?

A. Yes, sir.

Q. How long is it your custom to wait before, under the tariff, notifying the shipper that a perishable shipment is unclaimed?

A. Forty-eight hours after the date of notice.

Q. Did Messrs. Martin and Porter have any office or agent at Richmond?

A. Not that I know of.

Q. Do you know what kind of notice was sent to them?

A. I think it was mail notice.

Q. I hand you herewith what purports to be copy of a telegram sent from the office of the General Agent under date of November 14th, 1925, to the Michigan Potato Growers Exchange, Cadillac, Michigan, which states: "Fruit Growers 27195 and 41759, potatoes, Martin, undelivered. G. A. Warthen." I will ask you if you can identify that as a copy of the wire sent in regard to the car involved in this case, which is 41759?

A. Yes, sir. Also has the pro-number shown at the bottom which is further evidence.

Q. Does the pro-number on the bottom of this telegram correspond with the pro-number contained on that delivery sheet?

[fol. 125] A. Yes, sir; 5584. (Referring to "Ex. Wilson #—.")

Q. This telegram is dated November 14th. Do you know when the reply telegram was received from the Michigan Potato Growers Exchange? I hand you herewith what purports to be a telegram received November 16th, 1925, from the Michigan Potato Growers Exchange: "Please release to Alfred Rose, without any papers, Fruit Growers 27195, Growers 41759, Growers 42884, Growers 27182 and 15453." Can you identify that as a copy of the telegram received from the Michigan Potato Growers Exchange on that date?

A. This is the original. I looked this up. I found this paper, myself.

Q. That telegram covers the car involved in this case, 41759?

A. Yes, sir.

Q. I hand you what purports to be a letter written by Mr. Alfred Rose, agent for the Michigan Potato Growers Exchange, dated November 16th, in which he requests certain cars to be switched to D. S. Harwood's warehouse. I ask you if you can identify that as the order received from Mr. Rose?

A. Yes, sir.

NOTE.—Paper identified by witness filed and marked "Ex. Wilson #4."

Cross-examination.

By Mr. Hall:

Q. Mr. Neiss, I understand from your testimony that your information that the owners, Martin and Porter, directed the delivery of this car is based upon the name of D. S. Harwood on that delivery receipt?

A. I told him that was all that we could find.

Q. Do you know whose signature that is, or whose handwriting the name of D. S. Harwood is?

A. No, sir; I do not.

Q. Did you not at one time think that that was D. S. Harwood's receipt for that car?

A. No; I did not.

Q. Has your office a receipt from D. S. Harwood for this car of potatoes?

A. No, sir.

Q. What record have you to show Mr. Harwood's receipt of this car?

A. We wouldn't require that.

Q. Do you mean you just put a car down there?

[fol. 126] A. Yes, sir.

Q. And let it stay?

A. Yes, sir. We don't get receipt for a carload of freight when placed on a man's siding.

Q. You are not prepared to state, are you, that Mr. Martin or Mr. Porter directed you to deliver this car to D. S. Harwood?

A. No, sir.

Q. Your information is just based on the name, D. S. Harwood, appearing on this delivery receipt? (Ex. Harwood #3.)

A. Yes, sir.

Q. Now, Mr. Neiss, you have introduced a copy of a telegram of November 14th ("Ex. Wilson #1") to the Michigan Potato Growers Exchange, notifying them that cars 27195 and 41759, the last of which is the car here involved, are undelivered; and the telegram of the Michigan Potato Growers Exchange in reply to that ("Ex. Wilson #2"), in which they ask you to release to Alfred Rose those two cars in that telegram and three other cars; and you have also introduced a letter of November 16th to Alfred Rose, which is the same date as the receipt of that telegram, directing delivery to D. S. Harwood's warehouse four of those five cars. Will you please look at that letter and tell the jury whether or not the car here in controversy is mentioned in that letter?

A. No, sir; it is not.

Q. Then, Mr. Rose did not direct the railway company to deliver this car here involved to D. S. Harwood, did he?

A. No, sir.

Q. If Mr. Martin and Mr. Porter testified that they had come in on the morning of November 16th, which is the same day as the date of this letter, and paid the freight and demurrage on this car at approximately ten o'clock in the morning, are you prepared to say that they are not correct?

A. No, sir.

Q. At what time of day was this telegram received from the Michigan Potato Growers Exchange?

A. 12:30 P. M. on the 16th.

Q. November 16th, 12:30 P. M.?

A. Yes, sir.

Q. On that same day you got from Mr. Alfred Rose, to whom you were directed to turn over these five cars, a letter directing you to deliver four of them to the Harwood warehouse?

[fol. 127] A. Yes, sir.

Q. The one omitted in Mr. Rose's letter was the car here involved, was it not?

A. Yes, sir.

Q. Now, Mr. Neiss, on that same day, November 16th, according to the testimony of Mr. Miller, your office called his office by telephone and directed the delivery of four cars of potatoes, four of the five cars mentioned in that telegram, to the D. S. Harwood Warehouse, and introduced this order of November 16th ("Ex. Munson #1"), in which he says "confirming the order which he received by telephone for the delivery of four cars of potatoes to the Harwood warehouse." I ask you to refer to that and see whether or not the order for the delivery of those four cars includes the car here involved, namely, 41759?

A. Yes, sir; it is the fourth car.

Q. And it omits one of the others, does it not?

A. Yes, sir.

Q. Please look at this letter of Mr. Rose's and tell the jury which of the cars is omitted.

A. F. G. Ex. 27182, the one with the ring around it.

Q. That has a big pencil ring around it?

A. That is true.

Q. Do you know how that ring got there?

A. Yes, sir.

Q. How did it get there?

A. I didn't put it there myself, but I know that is our usual way of doing it.

Q. What is that for?

A. This particular car was on 9th street yards; the rest of them were at Fulton. This one had to be carded by us. These four had to be carded in Fulton. A ring around it for the clerk, to call his attention to the fact that this particular car has got to be switched by us and not by Fulton.

Q. Mr. Miller wouldn't have anything to do with that particular car?

A. No, sir.

Q. If Mr. Miller testified a few moments ago, Mr. Neiss, that his records showed receipt of an order for delivery of that particular car to the Harwood Warehouse, and that his records also showed that he executed that order on November 17th at 12:30 P. M., or thereabouts, he is mistaken, is he?

A. Well, no; not necessarily, because we would issue the [fol. 128] orders direct. We couldn't confirm a phone conversation. We would make a switching order out in our Office.

Q. That order would be issued to Mr. Miller?

A. Yes, sir.

Q. I thought you said he wouldn't have anything to do with it?

A. I mean confirming the phone conversation.

Q. Are you prepared to produce an order directing the delivery of car 27182 to the Harwood Warehouse, the one omitted in that order?

A. There is an order right there. (Indicating.)

Q. I mean an order from you directing employees of the road to deliver that car?

A. That would be a switching order. That goes to the Auditor's office. You would have to get that from him.

Q. That wouldn't have to be executed at the Fulton yards?

A. No, sir.

Q. Then, Mr. Miller must be incorrect if he says his record shows his office executed that order?

A. No, sir. He would execute it finally, but it would come from us first. It is just this way. If a car is on the 9th street yard, we make a switching order out, ourselves. When the car travels from us to Fulton and then to the Southern Railway on the same order, he executes the order, but he does not make it.

Q. Then, your explanation of that pencil ring around that car number there (27182) is that that is your usual way of showing that that car was on the 9th street yard, while the other three cars named in that letter were at the Fulton yards?

A. Yes, sir.

Q. You don't think that that ring could have anything at all to do with the fact that a mistake was made by inserting the number of the car here in controversy in this order for delivery to Harwood in lieu of this number here which should have been inserted.

A. No, sir.

Q. Shouldn't have anything to do with it?

A. No, sir.

Redirect examination.

By Mr. Spicer:

Q. This car that Mr. Hall has referred to as having a ring around it, that had to go to Fulton to get to the Southern?

A. Yes, sir; had to go through Fulton.

[fol. 129] Q. So that Mr. Miller's records in showing that the car was transferred to the Southern are entirely correct?

A. That is right in line with the regular course of business. Just what I said awhile ago: The transfer would be made between nine and one, and that car went over at 12:30 the following day. That is exactly in line.

Q. It would be handled in a different way from other cars?

A. Just a little longer haul, that is all.

Witness stood aside.
Defendant rests.

EXHIBIT WILSON #1

The Chesapeake and Ohio Railway Company

Richmond, Va., 2 P. M. November 14th, 1925.

Michigan Potato Growers Exchange, Cadillac, Michigan:

Fruit Growers Two Seven Nineteen Five and Four Seventeen Five Nine Potatoes Martin Undelivered.

G. A. Warthen.

Collect.
Cy. Mr. Wilson.
Pros. 5584 and 5585. 11/12.

EXHIBIT WILSON #4

Phone: Randolph 3290. P. O. Box: 779

Alfred Rose, Car Lots Sales Agent, Fruits and Vegetables,
1210 East Cary Street

[fol. 130] Richmond, Va., Nov. 16th, 1925.

Freight Agent C. & O. R. R. Co., City.

GENTLEMEN: Please switch to D. S. Harwood's Warehouse Cary Street Cars FGE 27195, FGE 42884, FGE 27182, FGE 15452 loaded with Potatoes, and oblige.

Yours very truly, Alfred Rose, Agent for Michigan Potatoe Growers Exchange.

Nov. 16, 1925.

OK. 11/16/25.

With wire from Mich. Potato Growers Exc.

J. L. W.

EXHIBIT WILSON #2

Postal Telegraph-Commercial Cables
Clarence A. Mackay, President

Telegram

95W SH 35 Blue.

Grand Rapids, Mich., Nov. 16, 1925.

Agent C. and O. R. R., Richmond, Va., 63:

Please release to Alfred Rose without any papers Fruit Growers two seven nineteen five Growers four seventeen five nine Growers four two eight eight four Growers two seven eighteen two and fifteen four five three.

M. P. G. Exge. 11:21A.

[fol. 131] (Received at C. & O. Station, Ninth Street, Richmond, Va., Nov. 16, 1925.)

The Plaintiffs in rebuttal introduced the following evidence:

W. H. PORTER, a witness on behalf of the plaintiffs, being recalled in rebuttal, further testified as follows:

Examination in chief:

By Mr. Hall:

Q. You heard the testimony of Mr. Neiss, the last witness on the stand, to the effect that this car, 27182, which was one of the cars named in the letter from Alfred Rose to the Railway Company, directing del-very to D. S. Harwood and the car omitted in the order from the General Freight Agent on November 16th, 1925, was on the 9th street yards of the railway company, and that this black pencil circle was put around that car number for that reason, did you not?

A. Yes, sir.

Q. Please state, Mr. Porter, whether or not any one or more of those five cars of potatoes was on the 9th street tracks of the C. & O. Railway Co.?

A. No, sir. They were in Fulton.

Q. They had them in Fulton, all five of them?

A. Yes, sir. Inspected all five in Fulton yards.

Q. How many times?

A. Three or four times.

Q. Between what dates?

A. Up until November 16th, possibly five days prior to that; between November 11th and November 15th, I think.

Q. Did you see those five cars down there on November 16th, the day that four of them were rejected?

A. Yes, sir. We came here with the C. & O. inspector and inspected those potatoes, and the C. & O. Railway Co. wired that those potatoes were in good shape according to their inspector. We had inspected those five cars during a rain and in the dark and we came back again on Monday and reinspected them and tried to get the C. & O. inspector [fol. 132] to go down with us after we had reinspected the five cars. He said he was too busy, he couldn't go down there, he had already inspected them once and found nothing in the world the matter with them and he wasn't going to inspect them any more.

Q. Then, all five of those cars were, to your personal knowledge, on the Fulton yards on November 16th; that is, the day you paid the freight?

A. Yes, sir.

Cross-examination.

By Mr. Spicer:

Q. What time did you see them?

A. We got here probably at 9 o'clock, probably a little earlier.

Q. What time did you leave Fulton yards?

A. I guess an hour after that.

Q. Did you see them after that?

A. No, sir. We came up town and called up the broker and told him we had reinspected them thoroughly and weighed them and found they weighed under what they called for, and we would not take those four cars.

Q. You don't know whether they afterwards came up to 9th street yards?

A. No, sir; I don't know what became of them.

Witness stood aside.

H. E. **Martin**, a witness on behalf of the plaintiffs, being recalled in rebuttal, further testified as follows:

Examination in chief.

By Mr. Hall:

Q. Did you hear the testimony of Mr. Porter just made as to the five cars of potatoes included in this bunch of five, four of which you rejected, being on the Fulton yards of the Railway Company on the morning of November 16th?

A. Yes, I heard him.

Q. Were you with Mr. Porter at the time?

A. Yes, I was.

Q. Is his testimony correct?

A. It is.

[fol. 133] Cross-examination.

By Mr. Spicer:

Q. You didn't see them after that morning, did you?

A. No, I did not.

Witness stood aside.
Testimony closed.

And the defendant says that the matter aforesaid so introduced and shown in evidence to the jury by the plaintiffs is not sufficient in law to maintain the said issue on the part of the plaintiffs, and that it, the said defendant, is not bound by the law of the land to answer the same. The defendant assigns the following as its grounds of demurrer:

1. Evidence shows that the plaintiffs have failed to comply with Sec. 2 (b) of the bill of lading issued covering this shipment requiring claim for loss, damage or injury to property to be made in writing to the originating or delivering carrier or carriers issuing the bill of lading within six months after delivery of the property, or, in case of failure to make delivery then within six months after reasonable time for delivery has elapsed.

2. Evidence shows that the plaintiffs have failed to comply with the bill of lading requirement contained in the classifications adopted by the carriers transporting this shipment, requiring claim for loss, damage or injury to property to be made in writing to the originating or delivering carrier or carriers issuing the bill of lading within six months after delivery of the property, or in case of failure to make delivery then within six months after reasonable time for delivery has elapsed.

3. Evidence shows that plaintiffs have failed to comply with the provisions of the uniform Bill of Lading adopted pursuant to the provisions of the Interstate Commerce Act as amended and the Bills of Lading Act, requiring the claim for loss, damage or injury to property to be filed within six months after delivery of the property or, in case of failure to make delivery then within six months after reasonable time for delivery has elapsed.

[fol. 134] 4. Evidence fails to show that the damage claimed in this case, if any there was, was due to any negligence on the part of the defendant.

5. Evidence shows that even if the defendant were negligent in this case, such negligence was not the proximate cause of the damage claimed.

6. The evidence shows that the proximate cause of the damage claimed herein, if any there was, was the plaintiff's own negligence.

7. The evidence shows that the proximate cause of the damage claimed herein, if any there was, was the intervening, independent act of D. S. Harwood in not making proper inquiries as to the ownership of the potatoes involved in this case.

8. Plaintiffs' damage, if any there was (which is denied) was not due to any delay or damage while being loaded or unloaded, or damage in transit by carelessness or negligence.

9. The evidence shows that the plaintiffs have failed to make claim in writing to the carrier within the period prescribed by law for so doing.

10. The evidence shows that the plaintiffs have failed to comply with the provisions of the Interstate Commerce Act as amended regarding notice of claim.

11. The defendant's liability in this case was at most that of a warehouseman and the evidence fails to show negligence in this capacity.

Wherefore, and for want of sufficient matter in that behalf to the said jury shown in evidence, the said defendant prays judgment and that the jury aforesaid may be discharged from giving any verdict upon the said issue, and that the said plaintiffs may be barred from having or maintaining their aforesaid action against it.

Leake & Spicer, Counsel for Demurrant.

[fol. 135] IN LAW AND EQUITY COURT OF CITY OF RICHMOND, PART TWO

[Title omitted]

GROUNDS OF DEMURRER TO THE EVIDENCE

1. Evidence shows that the plaintiffs have failed to comply with Sec. 2 (b) of the bill of lading issued covering this shipment requiring claim for loss, damages or injury to property to be made in writing to the originating or delivering carrier or carriers issuing the bill of lading within six months after delivery of the property or, in case of failure to make delivery then within six months after reasonable time for delivery has elapsed.

2. Evidence shows that the plaintiffs have failed to comply with the bill of lading requirement contained in the classifications adopted by the carriers transporting this shipment, requiring claim for loss, damage or injury to property to be made in writing to the originating or delivering carrier or carriers issuing the bill of lading within six months after delivery of the property or, in case of failure to make delivery then within six months after reasonable time for delivery has elapsed.

3. Evidence shows that the plaintiffs have failed to comply with the provisions of the uniform Bill of Lading

adopted pursuant to the provisions of the Interstate Commerce Act as amended and the Bills of Lading Act, requiring claims for loss, damage or injury to property to be filed within six months after delivery of the property, or in case of failure to make delivery then within six months after reasonable time for delivery has elapsed.

4. Evidence fails to show that the damage claimed in this case, if any there was, was due to any negligence on the part of the defendant.

[fol. 136] 5. Evidence shows that even if the defendants were negligent in this case, such negligence was not the proximate cause of the damage claimed.

6. The evidence shows that the proximate cause of the damage claimed herein, if any there was, was the plaintiff's own negligence.

7. The evidence shows that the proximate cause of the damage claimed herein, if any there was the intervening, independent act of D. S. Harwood in not making proper inquiries as to the ownership of the potatoes involved in this case.

8. Plaintiffs' damage if any there was (which is denied) was not due to any delay or damage while being loaded or unloaded, or damage in transit by carelessness or negligence.

9. The evidence shows that the plaintiffs have failed to make claim in writing to the carrier within the period prescribed by law for so doing.

10. The evidence shows that the plaintiffs have failed to comply with the provisions of the Interstate Commerce Act as amended regarding notice of claims.

11. The defendant's liability in this case was at most that of a warehouseman and the evidence fails to show negligence in this capacity.

Leake & Spicer, p. d.

IN LAW AND EQUITY COURT OF CITY OF RICHMOND

JUDGMENT—June 6, 1927

This day came again the plaintiffs and the defendant, by counsel, and the demurrer to the evidence having been argued and the Court being of the opinion for reasons stated in writing and now made a part of the record, that the evidence is sufficient in law for the plaintiffs to maintain the issue joined on their part, doth overrule the said demurrer to the evidence; to which action of the Court the defendant, by counsel, excepted.

It is, therefore, considered by the ourt that the plaintiffs [fol. 137] recover against the defendant the sum of Sixteen Hundred and Eighty-four Dollars and Thirty-nine Cents ($1,684.39), with interest thereon to be computed after the rate of six per centum per annum from the 16th day of November, 1925, until paid, and their costs by them about their suit in this behalf expended.

The defendant, by counsel, then tendered to the Court its Certificate of Exception, which was received by the Court, signed and ordered to be made a part of the record, which is accordingly done.

Upon the motion of the defendant, by counsel, it is ordered that the judgment this day rendered herein be suspended for a period of ninety days from this date, in order to enable the said defendant to apply for a writ of error and supersedeas, upon condition that the said defendant or someone for it, enter into a bond before the Clerk of this Court in the penalty of Two Thousand Dollars, with surety to be approved by the said Clerk, and conditioned according to law, with fifteen days from this date.

IN LAW AND EQUITY COURT OF CITY OF RICHMOND, PART TWO

MARTIN & PORTER

against

CHESAPEAKE & OHIO RAILWAY COMPANY

MEMORANDUM BY THE COURT

After all the evidence offered by both parties was in, the defendant tendered its demurrer to the evidence, in which the plaintiffs joined.

Under familiar rules all evidence submitted by the plaintiffs must be taken as true and every reasonable conclusion that might be drawn therefrom must be drawn by the Court. The Court then must accept the following facts:

(1) The potatoes in suit were shipped from Wyman, Mich., Nov. 6, 1925, and arrived at the Fulton Yards of the Chesapeake & Ohio Railway, at Richmond, Virginia, on Nov. [fol. 138] *12*, 1925. They were inspected Nov. 16, 1925, by the plaintiffs, who paid the freight and presented an order in their behalf from the consignor. Plaintiffs then ordered the car of potatoes to be delivered by the Chesapeake & Ohio Railway to Bowman's Warehouse.

The car to reach Bowman's Warehouse had to be switched over the tracks of the Southern Railway.

(2) The Chesapeake & Ohio Railway negligently (improperly) gave the Southern Railway*s* orders to deliver the car to Harwood's Warehouse which was several blocks distant from Bowman's.

(3) The potatoes were delivered to Harwood's Warehouse and remained there unknown to the plaintiffs until some time in May, 1926, and while there spoilt presumably from exposure to heat and cold.

(4) Plaintiffs had been led to believe by the Chesapeake & Ohio that it would deliver the car of potatoes to Bowman's Warehouse. It is fair inference to be drawn from the fact that the potatoes were to be stored in a public warehouse that they were to remain the*s*e some time. Lulled into security thus by the Chesapeake and Ohio and strengthened in that feeling by a personal visit to Bowman's Warehouse and being thus assured their potatoes were there, they had no knowledge the potatoes were elsewhere until May 25, 1926, when information reached them the potatoes were at Harwood's Ware*g*ouse.

(5) The potatoes having been damaged in the meantime plaintiffs on May 26, 1926, gave defendant written notice of their claim for damages.

(6) From the date of shipment at Wyman, Mich., (Nov. 6, 1925), until the giving of such notice (May 26, 192*5*), there ha*s* elapsed 6 months and 20 days.

It is claimed that this written notice was not within six months after a reasonable time for delivery had elapsed.

J. A. Neiss, a witness in the employ of the defendant company, called to the stand by it, testified that in his opinion [fol. 139] eight days was a reasonable time for delivery and anything beyond eight days was a delayed movement.

It is contended by the defendant that this action should be dismissed and judgment rendered for the defendant because of failure by the plaintiffs to give the notice provided for in the bill of lading.

It is urged inasmuch as this testimony was not controverted that the Court must accept it as true and take without question this witness' opinion, expressed in a most meager way, as conclusive of what was a reasonable time for delivery.

A demurrer to the evidence deprives the demurree of his right to trial by jury. It is, therefore, well settled that the Court must take that view of the evidence most favorable to the demurree that a jury might have taken. The Jury are the sole judges of the credibility of a witness. As said in Chesapeake & Ohio v. Barger, 112 Va., p. 692: "A jury is not bound to accept as conclusive the testimony even of an unimpeached witness," and quoting from Clopton's Case, 109 Va. 813: "The jury have the power to refuse their credit to parol testimony and no action of the Court should control the exercise of their admitted right to weigh its credibility." There are other authorities to the same effect.

The testimony of this witness was no part of the plaintiffs' case. The evidence shows the mistake was made through his office. No jury would be required to accept his testimony as conclusive and by a demurrer to the evidence the Court cannot be required to do so.

As the jury might have disregarded the unimpeached opinion of this witness the Court is required to do so.

Many cases are cited by counsel in their note of argument, in which the Courts have stated as a matter of law that the notice of claim came more than six months after a reasonable time for delivery. But these were extreme cases about which fair-minded men could not reasonably differ. The instant case is one in which a jury could believe 20 days was a reasonable time for the movement of said freight.

The Court must conclude, therefore, that the notice in the instant case was filed in time.

Another and more cogent reason for holding the notice in time arises on the ground of estoppel.

There was a mis-delivery in this case which the Courts hold equivalent to non-delivery. The circumstances were unusual and peculiar. The order from the plaintiffs was [fol. 140] to deliver the potatoes to a designated warehouse, presumably and naturally for storage. Defendant accepted this order which was equivalent to an assurance it would so deliver them. This lulled the plaintiffs into a feeling of security. They had a right to rely on the defendant's assurance. From this feeling of security they were not awakened until May 25, 1926, then only to find their potatoes spoilt and the defendant who had lulled them into security asserting that it was too late to make claim against it.

The provision requiring notice of claim was permitted as a part of the contract of shipment for wise and salutory reasons. It should never apply when the very nature of the carrier's negligence has been the means of preventing the consignee from making his claim.

The doctrine of estoppel had its origin in just such cases. Estoppel is founded upon the highest principles of morality and recommends itself to the common sense and justice of everyone. A party may be estopped to claim the benefit of a right if by his conduct he has caused another party to occupy a more disadvantageous position than that which he would have occupied except for such conduct.

It is urged that no estoppel can arise against a carrier in such a case. Counsel rely on

Davis v. Rodgers, 139 Va. 618.
Metz v. B. & M. R. R. Co., 116 N. E. 475.
Georgia, &c., R. R. Co. v. Bliss Mill Co., 241 U. S. 190.
Texas & Pac. R. R. Co. v. Leatherwood, 250 U. S. 478.

In Davis v. Rodgers, supra, it was unnecessary to a decision to invoke the doctrine of estoppel. It is true the Court quotes from 241 U. S. and 250 U. S., supra, strong expressions denying the applicability of the doctrine of estoppel. But an examination of these cases shows that the expressions there were unnecessary to the decision.

In Georgia, &c., v. Bliss Mill Co., supra, it was held that a sufficient notice was given in time.

In Texas & P. R. R. v. Leatherwood, supra, Mr. Justice [fol. 141] McReynolds & Mr. Justice Van Devanter while concurring in the result reached, say:

"But the broad declaration that the parties to a bill of lading cannot waive its terms nor can the carrier by its conduct, give the shipper the right to ignore them, goes beyond what is necessary to the decision and I am not prepared to assent to it as a proposition of law."

It will be noticed that the majority opinion in that portion dealing with estoppel and referred to by Mr. Justice McReynolds and Mr. Justice Van Devanter as obiter, bases its conclusion on cases where the carrier had quoted to a shipper less than the legal freight rate. It was necessary to do this to make effective the law prohibiting discrimination by carriers between shippers.

It is obvious that a carrier by conduct cannot estop itself from doing something the law requires it to do. Public policy requires this.

In the instant case the carrier has failed to do what the law required it to do and it would be a curois doctrine to relieve it under such circumstances.

The case most similar in principle to the instant case is that of C. & O. Ry. Co. v. Rebman, 120 Va., page 71, 73. That case involved a shipment of lambs. The C. & O. Railway failed to deliver the lambs that were actually shipped, but in their place delivered to the consignee another shipment of lambs of inferior grade. The consignee innocently accepted them and did not discover the mistake until after the ordinary time limit for filing notice of claim had expired. It was held that notice given without delay as soon as the negligence was discovered was in time.

This case has not been distinguished, explained nor expressly overruled in any subsequent Virginia case and is accepted as still the law in Virginia.

With reference to the expressions found in the cases on estoppel cited by the defendant it may be said, or rather quoted, "expressions in judicial opinions should always be scanned and interpreted with reference to the specific issues then to be decided."

Demurrer will be overruled and judgment entered for plaintiff.

Frank T. Sutton, Jr.

[fols. 142 & 143] IN LAW AND EQUITY COURT OF CITY OF RICHMOND, PART TWO

[Title omitted]

CERTIFICATE OF EXCEPTION

The Court certifies that at the conclusion of the evidence in this case, the defendant demurred to the evidence, in which the plaintiffs joined, the testimony being set out in full in the written demurrer as filed; that the same having been argued the Court overruled the demurrer to the evidence, and directed judgment to be entered on the verdict of the jury; to which ruling of the Court in overruling the demurrer to the evidence and in directing judgment to be entered for the plaintiffs the defendant excepted.

Teste this 6th day of June, 1927.

Frank T. Sutton, Jr., Judge.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 144] Minute entry of argument and submission March 29, 1928, omitted in printing.

[fol. 145] IN SUPREME COURT OF APPEALS OF VIRGINIA

JUDGMENT

In the Clerk's Office of the Supreme Court of Appeals, held at the Library Building, in the City of Richmond, on the 27th day of June, 1928, the following copy of an order of this court, entered at its place of session, at Wytheville, was this day received by the clerk here:

"VIRGINIA:

"IN THE SUPREME COURT OF APPEALS, HELD AT THE COURT HOUSE OF WYTHE COUNTY, IN THE TOWN OF WYTHEVILLE, ON THE 14TH DAY OF JUNE, 1928

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Plaintiff in Error,

against

H. E. MARTIN and W. H. PORTER, Defendants in Error

Upon a Writ of Error and Supersedeas to a Judgment Rendered by the Law and Equity Court of the City of Richmond, Part II, on the 6th Day of June, 1927

"This cause, which is pending in this court at its place of session at Richmond, having been fully heard but not determined at said place of session; this day came here the parties, by counsel, and the court having maturely considered the transcript of record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore considered that the same be affirmed, and that the plaintiff in error pay to the defendants in error damages according to law, and also their costs by them expended about their defence in this behalf herein.

Which is ordered to be entered in the order book here and forthwith certified, together with a certified copy of the opinion in this case, to the clerk of this court at Richmond, who will enter this order in the order book there and certify it to the said Law and Equity Court of the city of Richmond, Part II.

A copy. Teste: J. M. Kelly, C. C.

Teste: H. Stewart Jones, C. C."

Defendants in error'- costs, $22.59.

[fol. 146] IN SUPREME COURT OF APPEALS OF VIRGINIA

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

v.

H. E. MARTIN and W. H. PORTER

Opinion by Judge Preston W. Campbell

LAW AND EQUITY COURT OF CITY OF RICHMOND, PART II

OPINION—June 14, 1928

This was an action brought by Martin and Porter, hereinafter called plaintiffs, against the defendant railway company, to recover damages for an alleged misdelivery of a carload shipment of potatoes. The defendant demurred to the evidence, the court overruled the demurrer and rendered judgment for the plaintiffs, and to that judgment this writ of error was awarded.

The material facts are these: In the fall of 1925, the plaintiffs, who were residents of New Kent and James City counties, respectively, were associated as partners in the sale and purchase of potatoes. They had contracted to purchase twenty cars of potatoes from the Michigan Potato Growers Exchange, to be delivered at Richmond, Virginia, subject to the right of inspection at that point. The plaintiffs had no place of business in Richmond, but had arrangements to store the potatoes with the Bowman Transfer and Storage Warehouse. Before the arrival of the potatoes in issue, plaintiffs gave to the defendant a list of the car numbers and notified it that all potatoes billed to them were to be placed in storage in the Bowman Warehouse and [fol. 147] to deliver same to the warehouse.

The potatoes in suit were shipped from Wymans, Michigan, on November 6, 1925, and arrived at the Fulton yards of the Chesapeake and Ohio Railway, at Richmond, Virginia, on November 12, 1925. They were inspected November 16, 1925, by the plaintiffs, who paid the freight and presented an order in their behalf from the consignor.

The car, to reach Bowman's warehouse, had to be switched over the tracks of the Southern Railway. The defendant, having been notified to deliver all potatoes billed to plaintiffs to Bowman's warehouse, gave Southern Railway orders to deliver the car to Harwood's warehouse, which was several blocks distant from Bowman's. The potatoes were delivered to Harwood's warehouse and remained there unknown to the plaintiffs until some time in May 1926, and while there spoiled, presumably from exposure to heat and cold.

Plaintiffs, on May 26, 1926, gave defendant written notice of their claim for damages. From the date of shipment at Wymans, Michigan, (November 6, 1925), until the giving of such notice (May 26, 1926, there elapsed six months and twenty days.

Section 2 (b) of the Uniform Bill of Lading covering the shipment, which was issued by the Pere Marquette Rail- [fol. 148] road, at Wymans, Michigan, provided as follows:

> "(b) Claims for loss, damage, or injury to property must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after delivery of the property at port of export), or in case of failur*w* to make delivering, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed; provided that if such loss, damage, or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice or claim nor filing of claim shall be required as a condition precedent to recovery."

It is the contention of the defendant that the notice required in the bill of lading has not been given by the plaintiffs. This contention is based upon the testimony of J. A. Neiss, the assistant clerk, who had been notified to deliver the potatoes to Bowman's warehouse. This witness stated that in his opinion "about eight days" was a reasonable time for delivery. An examination of the testimony of this witness does not show that he had any intimate knowledge upon the subject of what was a reasonable time for such shipment. However, it is argued that his evidence is conclusive as he stands unimpeached. Had the case upon the [fol. 149] merits been submitted to the jury, they would have been the judges of the credibility of this witness.

In Metropolitan Life Insurance Company v. Botto, (opinion handed down this day), it is said: "While the defendant practically concedes that the jury are the triers of fact, it is most strenuously argued that they are bound by the testimony of their unimpeached witnesses. It is true as a general proposition that the evidence of an unimpeached witness, if not inherently incredible, should be believed. But the fact that a witness has not been impeached —employing the term in its common acceptation—is not conclusively binding upon the jury. The jury are the judges of the credibility of the witness, and they have the right to determine from his appearance on the stand, his manner of testifying, his candor and fairness, his contradictions, if any, what weight shall be given to his evidence. Horton's Case, 99 Va. 885; Clopton's Case, 109 Va. 918; Conrad v. Williams, 6 Hill (N. Y.) 444; Charleston Ins. Co. v. Corner, 2 Gill (Md.) 411; C. & O. Ry. Co. v. Barker, 112 Va. 692; Wigmore on Evidence, section 2034."

As a matter of law, if they jury upon a trial on the merits, could not be compelled to accept as true the testimony of the witness, Neiss, the court, in passing upon the [fol. 150] demurrer to the evidence, should not be required to do so.

Through no fault of the plaintiffs, there was as a result of defendant's negligence, a misdelivery of the potatoes. This action upon the part of the defendant was equivalent to non-delivery. Plaintiffs had a right to rely upon their notification to defendant to deliver their potatoes to Bowman's warehouse. This being true, we cannot say that plaintiffs have failed in carrying out their part of the contract as to notice, when they were in ignorance of the breach of contract upon the part of the defendant as to delivery. It must be conceded that plaintiffs promptly made claim when they discovered the true state of affairs. What is a reasonable time in case of shipment of goods cannot be defined with exactitude. What is a reasonable time in one case may not be a reasonable time in a similar case.

Whatever may be the decisions of the court elsewhere, we are of the opinion that the doctrine laid down in Chesapeake and Ohio Ry. Co. v. Rebman &c., 120 Va. 71, should be adhered to. In that case, plaintiffs delivered to the defendant two carloads of lambs for shipment from New Castle, Virginia, to Jersey City, New Jersey, under the "Uniform Live Stock Contract." The defendant failed to deliver the lambs shipped, but in their stead delivered a different lot [fol. 151] of lambs, of an inferior grade and value, to plaintiffs consignee, who in ignorance of this unaccounted for exchange of lambs, sold them and remitted the net proceeds to the consignee. Upon discovering the mistake, plaintiffs notified the defendant who denied liability. An action was thereupon brought by plaintiffs to recover the difference between the lambs shipped and those delivered to the consignee. There was a judgment for the plaintiffs. In the appellate court, the contention of the defendant was that the plaintiffs should be denied a recovery because "they did not present their claim within five days from the time the animals were removed from the cars or within a reasonable time thereafter."

In disposing of this contention, Judge Whittle said:

"If it be conceded that plaintiffs were under obligation to give notice of their demand under the circumstances of this anomalous transaction, the evidence shows that such notice was given without delay as soon as the negligence of the defendant which occasioned the loss was discovered."

Upon the whole case, we are of the opinion that the judgment complained of is right and must be affirmed.

A copy. Teste: J. M. Kelly, Clerk.

Teste: H. Stewart Jones, C. C.

[fols. 152a & 152] IN SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND

[Title omitted]

PETITION FOR REHEARING

To the Honorable Judges of the Supreme Court of Appeals or Virginia:

Your petitioner, The Chesapeake and Ohio Railway Company, respectfully represents that it is aggrieved by the judgment of this Honorable Court rendered on June 14th, 1928, affirming the judgment of the Law and Equity [fol. 153] Court of the City of Richmond, Part II, in the above styled case. Your petitioner therefore respectfully prays that the said cause may be reheard for the following, among other reasons:

The facts of the case are stated in the petition for writ of error and in the breifs of counsel, and need not therefore be restated herein.

I

This Court has declined to enforce and give legal effect to the specific terms of the bill of lading regarding the making of claim in writing.

In summarizing the evidence in the instant case, this Court in its opinion has said:

"Through no fault of the plaintiffs, *there was as a result of defendant's negligence, a misdelivery of the potatoes.* This action upon the part of the defendant was equivalent to non-delivery. Plaintiffs had a right to rely upon their notification to defendant to deliver their potatoes to Bowman's Warehouse. This being true, we cannot say that plaintiffs have failed in carrying out their part of the contract as to notice, when they were in ignorance of the breach of contract upon the part of the defendants as to delivery. *It must be conceded that plaintiffs promptly made claim when they discovered the true state of affairs.*" (Italics ours.)

[fol. 154] The bill of lading provision relied upon by the defendant, as a complete defense to the plaintiff's claim, specifically required claim to be made in writing, in case of failure to make delivery, "within six months * * * after a reasonable time for delivery had elapsed."

It is submitted with great deference, that the Court, in holding that it could not say "that plaintiffs have failed in carrying out their part of the contract as to notice," has declined to enforce and give legal effect to the specific terms of this valid stipulation as found in the bill of lading. It has unnecessarily rewritten the provision, incorporating within it two new qualifying factors, namely: (1) the carrier's misconduct in making a misdelivery, and (2) the claimants' actual knowledge of the fact of the misdelivery.

It is difficult to understand how the fact that the misdelivery of the shipment was a "result of defendant's negligence" could extend the time prescribed by the bill of lading for that very kind of claim. The limitation is not ambiguous. Obviously, a misdelivery claim not founded upon the defendant's misconduct could not be the subject of liability on its part. The terms of the provision as contained in the bill of lading would be meaningless if only to be applied to claims for which it was not responsible. There would be no occasion to name any time limit upon the filing of such claims.

Under the construction approved by this Court, no matter how long a shipper might remain in ignorance of the misdelivery of his own goods, he would still be allowed a reasonable period on which to make claim, after he had "discovered the true state of affairs." Notice of claim to the carrier could thereby be postponed for an indefinite length of time.

[fol. 155] But such a construction of the provision would defeat the very purpose of the provision in question, and deny the validity of the grounds upon which stipulations of this character have been repeatedly sustained.

In Georgia, etc. R. Co. v. Blish Milling Co., 241 U. S. 190; 60 L. ed. 948, it was said of a similar provision:

> "The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation. And to this end it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations."

The construction of the provision is in direct conflict with the decision of the Virginia Special Court of Appeals in the case of Davis v. Rodgers, 139 Va. 618. In that case, which involved the identical provision found here, Judge Holt, delivering the opinion of the court and adopting the significant language used in the case of Kahn v. American Railway Express, 88 W. Va. 17, said:

"Nor can the period of limitation be extended for lack of discovery of the loss. Negligence and unnecessary delay in the assertion of claim for losses in transportation are the evils against which the limitation provides."

Apparently this court considered that certain peculiar equities existed in the plaintiffs' favor which made the terms of the provision unreasonable as applied to the facts of the instant case.

[fol. 156] It was undisputed that within five weeks after seeing the potatoes in Richmond, and before any material deterioration had occurred, the plaintiffs were at least put upon inquiry as to a probable misdelivery by the following letter addressed to them by their warehouseman in reference to the shipment involved herein (Rec. p. 69):

"Richmond, Va., Dec. 22, 1925.

H. E. Martin & Co., Lanexa, Va.

GENTLEMEN: Thru error we mailed you under date of Nov. 24th, our warehouse Memorandum receipt for 260 bags Potatoes from Car FGE 41759.

This car was not stored in our warehouse but was placed in the warehouse of D. S. Harwood, and we ask that you return us this receipt, which you will find is numbered N. G. 6494.

Wishing you a merry Christmas, and with the personal regards of the writer, we are,

Yours very truly, Bowman Transfer & Storage
Warehouse Co., Clarence Wyatt, Jr."

Furthermore the plaintiffs admitted that they "were in the warehouse every other day or every third day" in between the time at which they saw the potatoes and the occasion upon which they eventually made claim (Rec. p. 50).

In addition to the full six months period given for filing [fol. 157] claims based upon causes other than misdelivery, there was the further allowance of a "reasonable time for delivery" made for the character of claims herein asserted. In nearly every misdelivery case there is likely to be a certain length of time in which the shipper or consignee does not know whether or not his goods are lost or merely delayed in transit. But the six months period allowed, subsequent to the "reasonable time for delivery," more than adequately covers this contingency.

Certainly in the light of the admitted facts which have been recited, it would in no sense be unreasonable or unjust to charge or imply to the plaintiffs herein, notice of the misdelivery, long prior to the time at which they assert they were fully aware of it.

It is therefore submitted that irrespective of previous judicial construction the bill of lading provision is entirely reasonable upon its face, and there are no circumstances shown in the instant case to warrant this Court in refusing to enforce and give legal effect to it. On the contrary, the facts illustrate the very type of case which justified the insertion of such a provision in the bill of lading.

[fol. 158] II

The decision of this Court is in direct conflict with decisions of the United States Supreme Court which are absolutely controlling of the questions involved.

Immediately following the language quoted above from the opinion in the instant case this Court states:

"Whatever may be the decisions of the court elsewhere, we are of the opinion that the doctrine laid down in Chesapeake & Ohio Ry. Co. v. Rebman, &c., 120 Va. 71, should be adhered to."

The holding of the Court seemingly ignores the fact that the construction of the bill of lading provision presents a question essentially Federal in nature, and upon which the decisions of the United States Supreme Court are absolutely controlling.

The provision construed in this case is found in the Uniform Through Bill of Lading issued by the Pere Marquette Railway, as initial carrier of an intertsate shipment, pursuant to Section 20 of the Interstate Commerce Act.

In discussing the effect of the Carmack Amendment to the Interstate Commerce Act, which first required the initial carrier to issue a through bill of lading, fixing the liability of all of the carriers handling the shipment, the United States Supreme Court, in the case of Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314, said:

[fol. 159] "That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist.

* * * * * * *

"*To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme, or indicate that Congress has not shown a purpose to take possession of the subject.* The first would be unthinkable, and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment. The duty to issue a bill of lading, and the liability thereby assumed, are covered in full; and though there is no reference to the effect upon state regulations, *it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject.*" (Italics ours.)

[fol. 160] And in Kansas City S. R. Co. v. Carl, 227 U. S. 639, 57 L. Ed. 683, the Court referring to the same statute, said:

"The liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment so far as it is valid under the act."

* * * * * * *

"That amendment undoubtedly manifested the purpose of Congress to bring contracts for interstate shipments under one uniform rule or law, and therefore withdrew them from the influence of state regulation."

The terms of the provision are well within the bounds prescribed by Paragraph 11 of Section 20 of the Interstate Commerce Act which provides in part:

"That it shall be unlawful for any * * * common carrier to provide by rule, contract, regulation, or otherwise, a shorter period for giving notice of claims than ninety days, for the filing of claims than four months, and for the institution of suit than two years * * *."

The identical provision was approved by the Interstate Commerce Commission in the Matter of Bills of Lading, 52 I. C. C. Rep. 671, 740, where it was said:

"These seem to be reasonable provisions in respect to the time of filing of claims, and so far as we are advised, they are not objected to by any of the shippers."

[fol. 161] The case of M. K. & T. R. Co. v. Harriman Bros., 227 U. S. 657, 57 L. Ed. 690, involved in a shipping contract to the effect that no suit should be brought after the lapse of ninety days from the happening of any loss or damage "any statute of limitations to the contrary notwithstanding." It was conceded that there were statutes both in Missouri, the state of the making of the contract and the state in which the loss and damage occurred, as well as in Texas, the state of the forum, which declared contracts invalid which required the bringing of an action for a carrier's liability in less than the statutory period, and that the suit was brought after the lapse of the period fixed by the contract but within the statutory period of both states.

In reversing the judgment of the Texas Court, which had held the provision to be void, the United States Supreme Court said:

"The liability sought to be enforced is the 'Liability' of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack amendment of the Hepburn act of June 29, 1906. The validity of any stipulation in such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed, is a Federal question to be determined under the general common law, and, as such, is withdrawn from the field of state law or legislation. Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. Rep. 148; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. Ed. 47, 33 Sup. Ct. Rep. 192. The liability imposed by the statute is the liability imposed by [fol. 162] the common law upon a common law carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence * * *."

"The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence, from death or disapperance of witnesses, destruction of documents, or failure of memory. *But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short.* That is a question of law for the determination of the court. Such stipulations have been sustained in insurance policies. Riddlesbarger v. Hartford F. Ins. Co., 7 Wall. 386, 19 L. Ed. 257. A stipulation that an express company should not be held liable unless claim was made within ninety days after a loss was held good in Southern Exp. Co. v. Caldwell, 21 Wall. 264, 22 L. Ed. 556. *Such limitations in bills of lading are very customary and have been upheld in a multitude of cases.*" (Italics ours.)

In the case of Georgia, etc. R. Co. v. Blish Milling Co., 241 U. S. 190, 60 L. Ed. 948, the United States Supreme Court had under consideration a misdelivery claim involving a bill of lading provision entirely similar to the provision herein, except that the former provision allowed "four months after a reasonable time for delivery," for the filing of claims, whereas the latter allowed "six months after a reasonable time for delivery."
[fol. 163] As to this period the Court said:

"The clause gave abundant opportunity for presenting claims, and we regard it as both applicable and valid."

In answer to a contention that the carrier had been guilty of conversion and therefore had abandoned the contract of shipment, the Court said:

"But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal act; *nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations.* A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed." (Italics ours.)

And in the case of Texas & Pac. R. Co. v. Leatherwood, 250 U. S. 478, 63 L. Ed. 1096, the Supreme Court of the United States further said:

"The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination; and *its terms in respect to conditions of liability are binding upon the shipper and upon all connecting carriers,* just as a rate properly filed by the initial carrier is binding upon them. *Each has in effect the force of a statute, of which all affected must take notice.* That a car- [fol. 164] rier cannot be prevented by estoppel or otherwise from taking advantage of the lawful rate properly filed under the Interstate Commerce Act is well settled. A carrier has, for instance, been permitted to collect the legal rate, although it has quoted a lower rate, and the shipper was ignorant of the fact that it was not the legal rate.

"The provision in the original bill of lading limiting to six months the time within which suit may be brought, not being unreasonable (Missouri, K. & T. R. Co. v. Harriman, 227 U. S., 657, 672, 673, 57 L. Ed. 690, 698, 33 Sup. Ct. Rep. 397), was valid; and as the original bill of lading remained binding, the lower courts erred in denying it effect." (Italics ours).

It is therefore earnestly submitted that these decisions of the United States Supreme Court fully established:

(1) That the bill of lading provision relied upon herein is to be construed in accordance with common law principles recognized and accepted in the Federal Courts;

(2) That neither express waiver nor the principles of estoppel can affect the liabilities and rights of the parties;

(3) That the provision in controversy "has in effect the force of a statute, of which all affected must take notice."

The holding of this court in the instance case is in direct conflict with these decisions, which are absolutely controlling of the questions involved, and which determine that no act or omission of the defendant could change the terms of the bill of lading.

[fol. 165] The Virginia Special Court of Appeals gave full effect to the propositions enumerated above, in the case of Davis v. Rodgers, (supra), from which extended quotation has already been made (Rec. pp. 14-17).

In the cases arising in other state courts which were cited in the petition for writ of error, (Rec. pp. 18-21), the great majority of which concern interstate shipments, the courts applied the identical principles contended for here, recognizing them to represent the rules of decision established by the United States Supreme Court.

In the case of C. & O. R. Co. v. National Bank, 122 Va. 471, this court, in discussing the question of burden of proof, in actions for damages for injuries to animate freight shipped in interstate commerce, said:

"In considering this question no reference to the statute in Virginia or the rules of decision in Virginia or elsewhere on this subject, with respect to intrastate shipments, would be of any help in arriving at a right conclusion since the liability for damages in the instant case is governed by the Federal statute law, and the common law rules applicable thereto as accepted and applied in Federal tribunals must govern. Cincinnati, etc., R. Co. v. Rankin, 241 U. S., 319, 36 Sup. Ct. 555, 60 L. ed. 1022, L. R. A. 1917-a, 265. Hence such statutes and decisions will not be referred to."

And in the recent case of C. & O. R. Co. v. Crenshaw & Co., 148 Va. 48, which involved a claim based upon damage to an interstate shipment, this Court said:

"The shipment involved being an interstate shipment, it [fol. 166] is well settled that rights and liabilities in respect of damage thereto depend upon acts of Congress, agreements between the parties and common law principles accepted and enforced in the Federal Courts. Chicago & N. W. Ry v. Whitnack Co., 258 U. S. 371, 42 S. Ct. 328, 66 L. ed. 665."

III

The decision of this court disregards the fact that even though the testimony of defendant's witness Neiss as to what was a reasonable time for delivery be rejected, the only other evidence in the record affirmatively shows that claim was not made in writing within the required period.

This Court has said that the testimony of defendant's witness Neiss, as to what was a reasonable time for delivery, although not objected to by counsel for the plaintiffs, was not conclusive, for the reason that "had the case upon the merits been submitted to the jury, they would have been the judges of the credibility of this witness."

His testimony was to the effect that a reasonable time for the shipment to be transported from Wyman, Michigan, and delivered to a consignee in Richmond, would be "about eight days." Claim in writing admittedly was not made by the plaintiffs until after the expiration of six months and twenty days from the date of shipment.

[fol. 167] It is an undisputed fact that the car of potatoes herein involved was shipped from Wyman, Michigan, on November 6th, and actually reached the defendant's receiving yards at Richmond, Fulton Yards, on November 12th, where it awaited a disposition order from the plaintiffs.

W. R. Miller, the defendant's general yardmaster, testified that less than twenty-four hours would be needed for the transfer of the car to the interchange track, assuming that delivery was to be made upon a siding served by the Southern Railway (Rec. p. 102).

G. C. Waddell, general yardmaster for the Southern Railway at Richmond, testified that a reasonable time for the execution of the movement of a car from the interchange track to the Bowman Warehouse would be from six to ten hours (Rec. p. 113).

Certainly none of this evidence would justify any inference that a reasonable time for delivery in the instant case would be anything like as much as twenty days. Nor is there any other proof in the record to the effect that a reasonable time for delivery could be more than eight days.

Disregarding Neiss' testimony, it is earnestly submitted therefore that this court has held that the jury would have been warranted in finding that a period of twenty days was a reasonable time for delivery, when there is an entire absence of evidence to support such a finding, and all of the proof submitted is to the effect that eight days would be a reasonable time.

It is therefore respectfully requested that a rehearing be granted in this case and that further consideration be given the questions raised herein.

And, as in duty bound, your petitioner will ever pray.

The Chesapeake and Ohio Railway Company, by Counsel. Leake & Spicer, for the Petitioner.

[fol. 168] Minute entry of submission September 11, 1928, omitted in printing.

[fol. 169] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

ORDER GRANTING REHEARING—Jan. 8, 1929

On mature consideration of the petition of the plaintiff in error to set aside the judgment entered herein on the 14th day of June, 1928, and grant a rehearing thereof, it is ordered that said judgment be set aside and annulled and a rehearing granted, and that this case be placed upon the privileged docket to be heard at the March Term.

A Copy. Teste: H. Stewart Jones, C. C.

[fol. 170] Minute entry of argument and submission November 8, 1929, omitted in printing.

[fol. 171] IN SUPREME COURT OF APPEALS OF VIRGINIA

CHESAPEAKE AND OHIO RAILWAY COMPANY, Plaintiff in Error,
against
H. E. MARTIN and W. H. PORTER, Defendants in Error

Upon a Writ of Error and Supersedeas to a Judgment Rendered by the Law and Equity Court of the City of Richmond, Part II, on the 6th Day of June, 1927

JUDGMENT—Mar. 20, 1930

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore considered that the same be affirmed, and that the plaintiff in error pay to the defendant in error damages according to law, and also their costs by them expended about their defence herein.

Which is ordered to be certified to the said Law and Equity Court of the City of Richmond, Part II.

A Copy. Teste: H. Stewart Jones, C. C.

Defendants in error's costs:

Attorney's fee	$20.00
Clerk's small fees	2.59
	$22.59

Teste: H. Stewart Jones, C. C.

[fol. 172] IN SUPREME COURT OF APPEALS OF VIRGINIA

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
v.
MARTIN & PORTER

Opinion by Justice Preston W. Campbell

LAW AND EQUITY COURT, PART TWO, OF CITY OF RICHMOND

OPINION—March 20, 1930

This case was decided by this court on June 14, 1928, and the judgment of the lower court was affirmed. A rehearing was granted plaintiff in error, and thus the case is before us again. The facts are fully set forth in the former opinion.

The main contention of the railway company is that the former decision of this court is in conflict with the decisions of the United States Supreme Court, as well as former decisions of this court.

The decision upon the former hearing was placed upon two theories: First. That the evidence was, upon a demurrer thereto, sufficient to justify the trial court in holding that the notice required by the bill of lading was given in a reasonable time; Second. That under the facts and circumstances of this case, Martin and Porter should be permitted a recovery for the loss of the potatoes, which was directly due to the negligence of the defendant in the non-delivery of the car of potatoes, and that the company is estopped from asserting the defence of lack of notice. [fol. 173] An examination of the cases relied upon by the company do not, in our opinion, sustain the contention that the law is that in every case a failure to give the required notice within the time limit fixed in the bill of lading precludes a recovery. It is true that in Georgia &c. Bliss Mill Co., 241 U. S. 190, strong expressions are used denying the applicability of the doctrine of estoppel, but such language was not necessary to a decision of the case. This was the view of Justices McReynolds and Van Devanter in Texas & P. R. R. Co. v. Leatherwood, 250 U. S. 478.

Davis v. Rodgers, 139 Va. 618, is also relied upon. That case quotes from Kohen v. American Ry. Ex. Co., 88 W. Va. 17, this language: "Nor can the period of limitation be extended for lack of discovery of the loss. Negligence and unnecessary delay in the assertion of claim for losses in transportation are the evils against which the limitation provides."

In Davis v. Rodgers it was unnecessary to a decision to invoke the doctrine of estoppel. In the opinion it is said: "It was always possible at the end of each day for the plaintiff to tell how much cotton was short * * *." Therefore, when plaintiff failed to give the required notice within the six months limitation, this court held he was barred. But such is not the situation here. When the car [fol. 174] of potatoes reached Richmond, plaintiffs paid the freight and ordered the company to deliver same to Bowman's warehouse for storage. They did not know, until the day before the notice was given, that the potatoes had not been delivered. In fact, until the time mentioned, they had been assured that the potatoes were in Bowman's warehouse.

In Davis v. Rodgers, supra, no mention is made of C. & O. Ry. Co. v. Rebman, 120 Va. 71, cited with approval in the former decision. The Rebman case has not been distinguished or overruled in any subsequent case, and we are of opinion that the instant case is ruled by it.

Affirmed.

[fol. 175] Clerk's certificate to foregoing transcript omitted in printing.

Judge's certificate to clerk omitted in printing.

Clerk's certificate to judge omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.